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PROCEDURES AND MECHANISMS RELATING TO COMPLIANCE UNDER THE KYOTO PROTOCOL

Elements of a compliance system and synthesis of submissions

Note by the co-Chairs of the joint working group on compliance

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Topics to be covered in further work on a compliance system under the Kyoto Protocol 9

I. INTRODUCTION

A. Mandate

1. During the tenth sessions of the subsidiary bodies, the joint working group on compliance (JWG) requested its co-Chairs, with the support of the secretariat, to produce a synthesis of responses by Parties to questions contained in its report,[1] including elements related to a compliance system under the Kyoto Protocol, for consideration by the JWG at its next session. Pursuant to the request of the JWG, three documents have been prepared. A compilation of 12 submissions[2] is contained in document FCCC/SB/1999/MISC.12 and Add.1. The synthesis of proposals is contained in the addendum to the present document, which presents the elements of a compliance system.

B. Scope of the note

2. This note has been prepared to assist the JWG in its deliberations on the development of a compliance system. It is recognized that other issues may emerge during the discussion, in particular in areas where Parties have not expressed any views in their responses. The note describes a broad convergence, among those Parties that have made submissions, on the objectives, coverage and functions of a compliance system. It outlines the possible institutional and procedural arrangements necessary for the performance of those functions, and indicates where further discussion is required about the various institutional and procedural aspects of a compliance system. Issues raised by Parties relating to an indicative list of consequences of non-compliance with the Kyoto Protocol are identified. Finally, a list of topics that could provide a framework for further work on a compliance system is proposed in the annex to this document.

C. Proposed action by the joint working group

3. The JWG may wish to consider the information provided in the three above-mentioned documents, and in particular:

(a) Comment on the approach outlined in the present note and give guidance on its further elaboration;

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[1] The report of the joint working group on its first session is contained in document FCCC/SBI/1999/8.

[2] Australia, Canada, China, Finland (on behalf of the European Community, its member States and Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Romania, Slovakia and Slovenia), Japan, the Republic of Korea, New Zealand, Poland, Samoa (on behalf of the Alliance of Small Island States), Saudi Arabia, Switzerland and the United States of America.

(b) Clarify and narrow the range of options for the design of the institutional and procedural arrangements of a compliance procedure;

(c) Advance consensus on the consequences of non-compliance, including those that could be associated with particular categories of non-compliance; and

(d) Request the co-Chairs to prepare, with the assistance of the secretariat, a text as a basis for further negotiation on a compliance system, taking into account the views expressed by Parties in their submissions, at the JWG and during the fifth session of the Conference of the Parties.

II. ELEMENTS OF A COMPLIANCE SYSTEM

A. Objectives, nature and principles

4. Responses from Parties indicate that a compliance system should promote implementation of the Kyoto Protocol and address potential non-compliance and non-compliance with commitments. To meet these objectives, the compliance system should seek to prevent non-compliance by providing opportunities for Parties having difficulty in complying to bring themselves into compliance, facilitate compliance by providing advice and assistance to individual Parties having difficulty in complying, and deter non-compliance by imposing consequences on Parties that have failed to comply.

5. The nature of the compliance system should be credible, efficient and fair, and provide for predictability, transparency and due process.

6. Further discussion will be required to determine how the compliance system can best take into account the principle of common but differentiated responsibilities under the Protocol.

B. Coverage

7. Parties' responses indicate that the compliance system would apply to the provisions of the Protocol as a whole. The compliance system would, however, need to take into account differences in the legal character and the specificity of these provisions. The commitments most relevant to the compliance system are those of Annex I Parties under Article 3. These commitments, together with those in Articles 5 and 7 (which are the means by which Annex I Parties demonstrate compliance with Article 3), as well as the mechanisms in Articles 6, 12 and 17 (which are the means some Annex I Parties may choose for meeting some of their commitments under Article 3) should be the main focus of the compliance system.

8. Parties' responses also suggest that the compliance system should consider the differences in the timing of the commitments, recognizing that some commitments are annual, some are due at the end of the commitment period, and others are continuous throughout the commitment period.

9. Consideration will need to be given by the JWG to the role of the compliance system in reviewing Parties' compliance with provisions adopted in accordance with Articles 3, 4, 5, 6, 7, 12 and 17.

C. Institutional and procedural aspects

10. The institutional and procedural arrangements that will make up the compliance system might be determined in accordance with various provisions of the Protocol.

Technical assessment

11. Technical assessment will mainly be undertaken by the expert review teams established under Article 8 of the Protocol. The role of expert review teams is to provide a technical assessment of all aspects of implementation of the commitments by an Annex I Party. This includes a review of information in the annual national inventory submitted for the purpose of ensuring compliance with Article 3, as well as supplementary information submitted in the national communication to demonstrate compliance with commitments under the Protocol.

12. The technical assessment would identify potential problems in, and factors influencing, the fulfilment of commitments. A view has been expressed that during the technical assessment inadvertent errors in the information submitted could be corrected.

13. Some Parties have suggested that questions identified by the experts may be automatically forwarded to the compliance body. However, other Parties' responses note that an expert review team should not have the authority to determine whether a Party is, or is not, in compliance; that function would be performed under the appropriate part of the compliance procedure.

Compliance procedure

14. All Parties support facilitative arrangements that would provide advice and assistance to any Party, including any non-Annex I Party, experiencing difficulty in complying with its commitments under the Protocol. Parties' responses suggest that a compliance procedure need not necessarily make a finding of non-compliance in order to recommend that a Party take a particular action, or that assistance be made available. A number of Parties suggest that the institutional and procedural aspects of establishing this part of the compliance procedure could benefit from the work carried out in designing a multilateral consultative process under Article 13 of the Convention.

15. Most Parties support the view that a compliance procedure could also have the functions of determining non-compliance and imposing binding consequences. These were referred to by some Parties as quasi-judicial or enforcement functions.

Treatment of cases

16. Parties' responses raise the issue of how the functions of facilitation and enforcement could best be carried out under a compliance procedure. One option that was put forward suggests that the facilitative and quasi-judicial or enforcement functions might best be performed by distinct procedures and/or by distinct bodies.

17. One approach would be that these functions operate in sequence, involving each body at different stages in the sequence. Any compliance-related problems would first be handled in a facilitative body. If a satisfactory result was not achieved based on the advice or assistance of the facilitative body, the matter could be referred to the quasi-judicial body authorized to impose consequences. Another approach would be to establish two bodies operating in parallel, with defined jurisdictions based on the nature of commitments at issue. Non-compliance with certain provisions, such as target-related commitments, could be referred immediately to the enforcement body. Matters related to compliance with other provisions could be referred to the facilitative body.

Eligibility to raise issues

18. A stage in the compliance procedure could be initiated by Parties, including by a Party with regard to its own compliance, and by a Party with regard to another Party's compliance. One issue that was raised is whether Protocol bodies, such as the Conference of the Parties serving as the meeting of the Parties to the Protocol (COP/MOP), the subsidiary bodies, expert review team or the secretariat should be able to initiate the compliance procedure with regard to a particular Party. It was also proposed that no stage of a compliance procedure should proceed unless approved by the COP/MOP.

19. Some Parties have suggested that how issues would be taken up in the compliance procedure should depend on the commitments it covers, and/or the range of consequences it is authorized to generate. It was suggested that on the basis of commitments undertaken by a Party, non-Annex I Parties may be restricted in initiating the compliance procedure with regard to other Parties.

Structure

20. There is broad recognition of the need for one or more specialized compliance bodies with limited membership, and with expertise in legal and technical fields relevant to the implementation of the Protocol. The expertise and the capacity in which the members serve may

differ, if distinct bodies are established with distinct mandates. Most submissions support the establishment of at least one standing body. Suggestions were made for the establishment of committees and ad hoc bodies. Parties suggest that regular meetings, for example, once or twice a year in conjunction with the meetings of the subsidiary bodies and the COP/MOP may be needed.

Role of the COP/MOP

21. Parties recognized that the COP/MOP, as the supreme body of the Protocol, will play an important role in the compliance procedure. They note that the COP/MOP, in accordance with Article 8.5, is to consider the information submitted by each Party related to compliance with its commitments, reports of expert reviews assessing the implementation of the commitments of the Party, and any questions raised by Parties. The Protocol also provides, in Article 8.6, for the COP/MOP, pursuant to its consideration of this information, to take decisions on any matter required for the implementation of the Protocol. Further discussion is needed on the extent to which the COP/MOP should play a role in initiating a compliance procedure, as well as in approving and reviewing the outcome.

Implications for the Kyoto mechanisms

22. Some Parties raised the issue whether a sub-procedure, or a distinct procedure, is needed for the Kyoto mechanisms. As the rules and modalities for these mechanisms are still under development, Parties' responses pointed out that further work is needed in the future on compliance-related aspects of the Kyoto mechanisms.

D. Consequences of potential non-compliance and non-compliance

23. All submissions support the view that a compliance system should provide incentive measures as well as enforcement measures. Incentive measures were specified as providing appropriate assistance or advice to Parties; and helping to overcome difficulties encountered by individual Parties.

24. A number of enforcement measures were identified: issuing cautions; suspension of rights, including eligibility to participate in the Kyoto Protocol mechanisms under Articles 6, 12, and 17; and penalties. Divergent views were expressed on the application of financial penalties.

25. The importance of certainty and predictability in the application of consequences for non-compliance was widely recognized. A degree of automaticity in the determination and application of consequences could strengthen the effect of consequences and help ensure the consistent treatment of Parties. It was also recognized that principles of fairness and due process may require the compliance procedure to exercise discretion in the determination of consequences, including through an opportunity for review or appeal. An automatic outcome is

set out in Article 6.4[3] of the Protocol, and it has been suggested that swift resolution of compliance issues would be required.

26. The implications of binding consequences with respect to the provisions of Article 18 of the Protocol were noted by Parties, and may need special consideration.

E. Other matters

27. The issue of the relationship between the settlement of disputes under Article 19 and a compliance procedure, in particular the quasi-judicial part of that procedure, was raised. Also, the importance of the establishment of domestic compliance systems was stressed by some Parties. There is broad agreement that these issues need to be explored in the future.

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[3] Article 6.4 provides that if a question of implementation by an Annex I Party is identified by the expert review process in the context of joint implementation, transfers and acquisitions of emission reduction units may continue, provided that any such units may not be used by a Party to meet its commitments under Article 3 until any issues of compliance are resolved.

Annex

TOPICS TO BE COVERED IN FURTHER WORK ON A COMPLIANCE SYSTEM UNDER THE KYOTO PROTOCOL

- Objectives, nature, principles

- Coverage

- Functions of a compliance procedure (one body or bodies)

  - facilitation
  - enforcement

- Eligibility to raise issues

  - expert review team
  - other bodies
  - Parties

- Structure (of a compliance body or bodies)

  - nature (standing or ad hoc)
  - size (limited membership)
  - composition
  - expertise
  - capacity in which members act
  - length of membership, possibility of re-election
  - appointment of chairman and vice-chairman
  - frequency of meetings

- Rules of procedure (of a compliance body or bodies)

  - information gathering
  - rights of participation
  - decision making
  - confidentiality

- Relationship to other bodies under the Protocol (e.g. role of COP/MOP, any mechanism bodies)

- Consequences of potential non-compliance and non-compliance

  - interim measures
  - indicative list of measures (incentives, disincentives)
  - application of automatic consequences

- Linkages to Article 19 of the Kyoto Protocol

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Addendum

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The joint working group on compliance (JWG), during the tenth sessions of the subsidiary bodies, requested its co-Chairs, with the support of the secretariat, to produce a synthesis of all proposals by Parties in response to questions contained in its report (FCCC/SBI/1999/8, annex II), and elements related to a compliance system under the Kyoto Protocol, for consideration by the JWG at its next session. Pursuant to the request of the JWG, three documents have been prepared. A compilation of 12 submissions from Australia, Canada, China, Finland (on behalf of the European Community, its member States and Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Romania, Slovakia and Slovenia), Japan, the Republic of Korea, New Zealand, Poland, Samoa (on behalf of the Alliance of Small Island States), Saudi Arabia, Switzerland and the United States of America is contained in document FCCC/SB/1999/MISC.12 and Add.1. The compliance elements are discussed in document FCCC/SB/1999/7 and the synthesis of proposals is contained in this addendum.

The addendum has been prepared on the basis of submissions by Parties without formal editing by the secretariat. Excerpts from the submissions are organized under headings drawn from the proposals as well as the questionnaire contained in the annex to the report of the JWG. The source of each proposal is indicated in the text. In some cases, narrative submissions have been abridged in order to avoid duplication.

I. GENERAL PROVISIONS

A. Objectives

1. The main objectives of the compliance system, which may be met by more than one of the Protocol's procedures and institutions, are to provide a transparent, predictable, and effective means of promoting the compliance by Parties with the Protocol's commitments. The compliance system should do this by:

(a) Carrying out in-depth technical assessments of the completeness and accuracy of information related to Parties' compliance;

(b) Clarifying Parties' mutual understanding of their commitments;

(c) Identifying, in advance of non-compliance, Parties that may have difficulty complying;

(d) Offering practical advice and assistance to Parties having difficulty complying;

(e) Determining instances in which Parties are, or are likely to be, in non-compliance with their commitments;

(f) Exploring with the Party concerned ways in which its non-compliance could be avoided or remedied; and

(g) Designing, recommending and approving responses to non-compliance that are appropriate to the case at hand. **(AOSIS)**[1]

2. The Kyoto Protocol's compliance system should encourage "compliance-pull" and facilitate compliance. Compliance-pull measures are those which promote and track compliance by Parties with their obligations under the Protocol. Examples of compliance-pull measures include transparent monitoring, reporting and review, including peer review. Facilitative measures include the provision of assistance and advice. It will be important to ensure that the system includes "early warning" elements which would enable Parties to identify and correct possible compliance problems. An emphasis on preventative elements should also be recognised. While examples from other multilateral regimes should inform the joint working group on Compliance's work, we need to recognise the importance of developing a compliance system which is tailored to the unique requirements of the Kyoto Protocol.

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[1] Submission from Samoa, on behalf of the Alliance of Small Island States.

3. The objectives of a compliance system for the Kyoto Protocol should stand in line with those of the Framework Convention and should as a first priority ensure the implementation of the commitment assumed by Annex B Parties under the Protocol.

4. A compliance system should be designed and developed with the following objectives in mind:

(a) Encouraging and promoting Parties to undertake and comply with their commitments;

(b) Providing Parties with certainty, transparency, and confidence as they implement their commitments, and with effective, fair, and equitable compliance-related procedures;

(c) Strengthening the efficient operation of the Kyoto Protocol Mechanisms;

(d) Securing the cooperation among Parties in their efforts to predict, identify, and prevent potential or actual non-compliance at an early stage; and

(e) Facilitating Parties to deal with in a timely and effective manner consequences of non-compliance (e.g. providing assistance and advice to Parties and allowing them the opportunity to correct problems resulting in or contributing to non-compliance). **(China)**

5. The objective of the compliance process should be:

(a) To provide advice to individual Parties in implementation of the Protocol;

(b) To overcome difficulties encountered by individual Parties in implementation of the Protocol;

(c) To prevent cases of non-compliance and disputes from arising; and

(d) To impose consequences, including sanctions where appropriate, if a Party fails to fulfill its obligations under the Protocol. **(European Union et al)**[2]

6. The compliance system should be so constructed as to facilitate compliance, provide early warning and give opportunities for rectification, and prevent non-compliance. It must also be efficient and workable, and ensure transparency and credibility. **(Japan)**

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[2] Submission from Finland, on behalf of the European Community, its member States and Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Romania, Slovakia and Slovenia (hereinafter called the European Union, et al).

7. To achieve the ultimate goal of the UNFCCC, the system should aim to facilitate compliance, prevent non-compliance or disputes, and ensure/promote compliance. **(Republic of Korea)**

8. The objective of the compliance system is to ensure the implementation of the Protocol and the ultimate objective of the Convention. The system should cover the following stages:

(a) Identification of non-compliance and possible non-compliance together with the underlying causes;

(b) Facilitation of the elimination of the cases of non-compliance;

(c) Facilitation of the fulfilment of commitments;

(d) Assessment of non-compliance cases;

(e) Proposals for sanction; and

(f) Monitoring of implementation of sanctions. **(Poland)**

9. The principal objective of the compliance system should be to motivate and facilitate compliance by Annex I Parties with their obligations, in particular commitments in Article 3 and Annex B of the Protocol to limit and reduce their greenhouse gas emissions. Article 3 is central to making progress in having Annex I Parties "take the lead in combating climate change and the adverse effects thereof". **(Saudi Arabia)**

(a) To ensure that emission reduction commitments are met by Annex B Parties;

(b) To prevent non-compliance by Parties, i.a. through early assessment of Parties' compliance;

(c) To encourage and support Parties in implementing of and complying with the Kyoto Protocol;

(d) To make compliance more attractive than non-compliance, considered under different aspects. **(Switzerland)**

10. It appears that a "compliance system" is intended to be broader than a "non-compliance" system, which would only concern itself with actual treaty violations. As such, a compliance system should have as its objectives not only preventing and addressing actual violations of legal obligations under the Protocol, but also promoting implementation of the Protocol more generally. **(USA)**

B. Nature

11. The nature of the system should be comprehensive and coherent, covering all of the Protocol's commitments, but graduated in a way that takes into account the differing characteristics of these commitments. While the main focus of the system should be on facilitating Parties' compliance in a non-confrontational manner, the system should also be capable of dealing with issues that have ripened into full "disputes" or that require a formal judgement and response to non-compliance. **(AOSIS)**

12. The design of the compliance system must recognise the highly technical nature of the subject matter and the "compliance elements" already provided for in the Protocol. The nature of the compliance system will thus be technical as well as legal, and this should be reflected in the manner in which compliance issues are developed by Parties and in the expertise present in the joint working group on Compliance. **(Australia)**

13. A compliance system is more than a non-compliance system. The latter will address, potentially in a punitive way, non-compliance with some or all obligations under a treaty. A compliance system, on the other hand, will emphasise facilitation as well as prevention and set out appropriate processes and responses that may differ according to the type of obligation and the degree of non-compliance, irrespective of any ultimate consequences that the system may provide. Canada believes in the importance of a "compliance approach". We must assume that Parties comply with their obligations and build a system where non-compliance will have to be proven. **(Canada)**

14. A comprehensive, coherent, strong, efficient, effective, and simple compliance system for the Kyoto Protocol is essential for the successful implementation and application of the Protocol. A compliance system so designed and developed for the Kyoto Protocol should be a preventive, cooperative, and facilitative system in nature. **(China)**

15. The nature of the process should be comprehensive, coherent, unified, strong, efficient and effective. It should, according to the circumstances, make use of both soft and hard consequences. **(European Union et al)**

16. Built-in compliance related provisions - Articles 5, 7 and 8 respectively provide for the estimation of emissions and removals, communication of information, and reviews of information. These provisions embody essential elements in the implementation of the Protocol by the Parties. Therefore, it is important to bear in mind these already built-in compliance mechanisms in the Protocol. **(Japan)**

17. The nature of the system should be coherent, comprehensive, fair, equitable, efficient, credible, and transparent. The principle of common but differentiated responsibilities should be incorporated. **(Republic of Korea)**

18. There should be substantial reliance on a multilateral consultative process (MCP), which works with Parties in a constructive manner to avoid emerging risk of non-compliance and to cure the causes of non-compliance. When the MCP has not achieved its objectives; penalties should be employed. The penalties should be reasonably severe, so as to provide sufficient motivation for the Party in question to comply, particularly with its Article 3 commitments, and to act as a deterrent to non-compliance by other Parties. **(Saudi Arabia)**

19. In terms of the nature of the system, several points are worth making, including, *inter alia*:

(a) The system must be designed to fit the specific needs and unique features of the Kyoto Protocol. Although elements from other regimes (environmental and/or non-environmental) may ultimately be adapted for Kyoto purposes, it is unlikely that wholesale adoption of a regime from a prior agreement will be appropriate.

(b) Recognizing its multiple objectives, the compliance regime should incorporate not only enforcement features but also facilitative/help desk features (given that compliance may in some cases be affected by the capacity of Parties, for example, their technical expertise, to meet their obligations).

(c) The system should be credible. Parties and the public need to know that, in the final analysis, there will be appropriate consequences for non-compliance.

(d) There should be reasonable certainty. There needs to be a certain level of automaticity to the system so that Parties know which actions/inactions will lead to which results and so that parallel infractions will be treated in a parallel manner.

(e) The system should be as transparent as possible. Transparency is likely to foster compliance, as well as confidence on the part of both Parties and the public in the system. **(USA)**

C. Principles

20. The compliance system, including whatever procedures and mechanisms are developed under Article 18 of the Protocol, should be:

(a) Preventative and precautionary, in that they should aim to prevent non-compliance before it occurs and carry out assessments based upon the precautionary approach;

(b) Comprehensive and coherent, in that they should be capable of addressing issues related to all commitments under the Protocol;

(c) Credible, in that they should be able to take up, examine and resolve compliance related issues without political interference;

(d) Transparent, in that their rules and procedures should be clearly and simply stated, and their reasoning and results should be based on sound information and be made publicly available;

(e) Graduated and proportionate, in that the procedures and mechanisms should take into account the cause, type, degree and frequency of non-compliance, and the common but differentiated characteristics of Parties' commitments and capacities;

(f) Predictable, in that Parties should be able to know in advance, the range of consequences that might attach to different categories of non-compliance; and

(g) Based on principles of efficiency and due process, that allow Parties, and in particular the Party concerned, an opportunity for a full, fair and timely resolution of compliance-related issues. **(AOSIS)**

21. In looking at the operational design principles which will guide the development of a compliance system for the Kyoto Protocol we will focus on the compliance system as a whole rather than on Article 18 explicitly. While Parties will need to consider the requirements of Article 18 at some stage during the Protocol implementation process, we consider that it is premature to do so at this juncture.

22. Useful pointers on these operational design principles can be gleaned from experiences with compliance systems under other multilateral treaty regimes. Certain operational design principles present themselves as givens in the development of any compliance system. We would include among these principles such as transparency, due process, reasonable certainty and the credibility of the system.

23. Other principles have been suggested for the compliance system, such as the principle of common but differentiated responsibility. It is not obvious to us what role such principles could play in a compliance system for the Kyoto Protocol. In any case, we do not consider that much time should be spent attempting to articulate and explicitly reflect "principles" in the development of the compliance system. Nor do we see the need to reflect explicitly any principles in the language that sets out the procedures and mechanisms for the compliance system. The joint working group on Compliance's time would be best utilised if Parties agreed on overarching operational design principles that would guide their work but did not seek to reflect these principles in any text produced by the Group. **(Australia)**

24. It is noted that Article 18 calls for appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of the Protocol. With this in mind, the development of an effective non-compliance regime should take the following principles into consideration:

(a) In the design and implementation of a compliance system as such, the principle of common but differentiated responsibilities between Annex I and non-Annex I Parties must be acknowledged as a corner stone of the system;

(b) The due cognizance should be given to the fact that a compliance system which reconciles with the sovereignty concerns of States is likely to draw great support from Parties. In this connection, the compliance system so designed should encourage Parties with sufficient flexibility to build and develop domestic regimes in accordance with their national circumstances to effectuate their commitments under the Protocol, provided they satisfy agreed international obligations.

(c) Consequences of non-compliance should be proportional to the types and nature of the obligations in question, depending on the identification thereof, and the seriousness of each case of non-compliance as well.

(d) Procedures and mechanisms concerning the non-compliance should be effective, impartial, and equitable and should operate in a timely and efficient manner.

(e) In addressing cases of non-compliance, facilitative and cooperative as well as enforcement measures should be applied with a view to meeting the main objectives of the compliance system. In this connection, complexity and confrontation should be avoided.

(f) An indicative list of consequences of non-compliance should be identified and developed, taking into account the cause, type, degree, and frequency of non-compliance.

(g) The compliance system should contain a competent body with authority to determine each case of non-compliance. The composition of this body should be based on the principle of equitable geographical representation.

(h) MCP as provided for by the Framework Convention and modified as appropriate should be fitted into the system. **(China)**

25. The compliance system should be based on the principles of fairness, equity, transparency, proportionality and due process, the latter meaning, in particular, that Parties concerned will have the right to participate in the proceedings and to present their views. **(European Union et al)**

26. The compliance system should be so constructed as to facilitate compliance, provide early warning and give opportunities for rectification, and prevent non-compliance. It must also be efficient and workable, and ensure transparency and credibility. **(Japan)**

27. When developing the procedures and mechanisms to implement Article 18 of the Kyoto Protocol, the objectives of the system (as described in para. 8) should be borne in mind. The procedures and mechanisms should be developed to be workable, predictable, cost-effective, consistent and credible. **(Republic of Korea)**

28. The procedures and mechanisms should be transparent, coherent, comprehensive and efficient, open to evolution and changes with experience gained. For some, precisely described breaches, automatic consequences could be envisaged. **(Poland)**

29. Multiple principles must be taken into account. These include:

(a) The procedures and mechanisms, and their implementation, must be fair, equitable, and recognize the common but differentiated responsibilities of the Parties and their social and economic conditions. Fairness and equity require elaboration of the procedural rights of a Party concerning determinations of its compliance/non-compliance. The entire fact-finding and decision-making process must be transparent.

(b) There must be strict compliance with the requirements of Article 18. Any decisions, however denominated, implementing Article 18 or any other provision of the Kyoto Protocol and entailing binding consequences for non-compliance by a Party must be adopted by means of an amendment to the Protocol. A broad, but reasonable, interpretation should be given to the phrase "entailing binding consequences", so that there is full compliance with this requirement of Article 18. For example, proposals by certain Parties that non-compliance with Articles 3, 5, or 7 of the Protocol should result in prohibiting participation in Articles 12 or 17 must be adopted, if at all, as amendments to the Protocol.

(c) An initial determination must be made in light of Article 18 concerning whether the procedures and mechanisms are applicable to non-compliance with rules, guidelines, principles, and/or modalities that implement other provisions of the Protocol. If an affirmative determination is made, the language chosen for those rules, guidelines, principles, and modalities must make clear which of them are requirements and which are recommendations. Requirements in particular must be written so that the nature and extent of all obligations are unambiguous and precise.

(d) The system should be based on the initial premise that Parties intend to honor their commitments and to act in good faith and that, in the absence of persuasive information to the contrary, non-compliance generally will be the result of misunderstandings or circumstances that either are unanticipated by the Party in question or likely beyond the reasonable control of that Party.

(e) When there is apparent non-compliance or apparent risk of non-compliance by a Party, the system should be designed to work with the Party in question through an MCP to determine: (i) whether there actually has been non-compliance (or is serious risk of future non-compliance); (ii) the causes thereof; and (iii) the steps the Party should take to avoid or cure non-compliance. If the Party fails to take recommended steps and non-compliance occurs or continues for specified amounts of time, the procedures should result in imposition of financial penalties, subject to review and approval by the COP/MOP.

(f) Bearing in mind the sovereign rights of the Parties, their domestic regimes for the enforcement of their respective laws and policies shall not be subject to standards or criteria of any kind or to review by the COP/MOP. **(Saudi Arabia)**

30. Comprehensive, coherent, unified, strong, equitable, efficient and effective procedure. Due process, full participation of the Party concerned.

31. Measures and sanctions shall be proportionate to the degree and circumstances of non-compliance. **(Switzerland)**

32. Numerous "principles" should guide the development of the Protocol's compliance system. Views on such principles or concepts are given in paragraphs 10 and 18.

33. Some Parties have expressed their interest in having the principle of "common but differentiated responsibilities" reflected in the compliance system. This principle is reflected in the substantive obligations of Parties under the Protocol. It is reflected, for example:

(a) In distinctions between obligations of Annex I and non-Annex I Parties;

(b) In distinctions among Annex I Parties to accommodate countries with economies in transition; and

(c) In the chapeau to Article 10, which defines Parties' obligations, among other things, "taking into account common but differentiated responsibilities".

34. It is unclear whether Parties supporting reflection of the principle of "common but differentiated responsibilities" in the compliance context are seeking a recognition that Parties may have different substantive obligations or whether they mean that Parties with the same type of obligations might be treated differently in terms of non-compliance procedures/consequences because of that principle. In our view, Parties that have undertaken the same type of obligations should be treated the same in terms of non-compliance. **(USA)**

II. COVERAGE

A. Types of issue

35. This procedure should address any issue related to the non-compliance or potential non-compliance of a Party with its commitments under the Protocol. **(AOSIS)**

36. The Protocol's compliance system should focus on ensuring the achievement of the emission limitation and reduction objective of the Kyoto Protocol. This objective involves the fulfilment of a series of legally binding obligations undertaken individually by Parties to the Protocol. **(Australia)**

37. Analysis will be needed at a later stage as to the appropriate coverage of the Protocol's compliance system. However, it is relevant at the outset that the Protocol contains a number of collective and hortatory provisions. Under international law, such provisions are treated differently to the individual obligations noted above. While collective and hortatory provisions are important in the context of the Kyoto Protocol, they should remain separate from the compliance system. Without prejudice to the manner in which these provisions will be handled in the future, it could be envisaged that appropriate review mechanisms would be set up under the COP/MOP to deal with matters related to the implementation of these provisions. **(Australia)**

38. The compliance system can be based on various provisions of the Protocol depending on the obligations that the system seeks to address. For example, it can be argued that non-compliance with the conditions established for the use of the Kyoto mechanisms should be directly related to the mechanisms: failure to provide information required under Article 7 could lead to the temporary suspension of the right to trade emission units. **(Canada)**

39. Issues to be addressed under this procedure should be non-compliance-related issues in general, and the implementation of the commitments under the Protocol in particular. **(China)**

40. We believe that a comprehensive compliance system should apply to all obligations under the Protocol. It should address not only cases of non-compliance but it should also facilitate compliance and prevent non-compliance. Of particular significance will be its application to policies and measures (Article 2); quantified emission limitation and reduction commitments (Article 3); reporting (Articles 5 and 7 as well as under the guidelines and modalities developed thereunder); and any obligations arising under the relevant principles, rules, modalities and guidelines developed for the Kyoto Mechanisms: joint implementation (Article 6), clean development mechanism (Article 12) and emissions trading (Article 17). Any consequences for non-observance of the principles, rules, modalities and guidelines developed under Articles 6, 12 and 17 contained in these principles, rules, modalities and guidelines, shall be considered as part of the comprehensive compliance system. **(European Union et al)**

41. The primary task of this procedure is to determine a Party's or a group of Parties' non-compliance with a central obligation of Article 3 of the Kyoto Protocol, that is Annex I Parties quantified emission limitation and reduction commitments. Additionally, this procedure should handle cases of non-compliance with other provisions of the Kyoto Protocol. This procedure will apply to all central and subsidiary and procedural obligations during the commitment period. **(Republic of Korea)**

42. The procedure should address the following issues:

(a) Commitments to be covered by the procedure;

(b) Ways and means to identify non-compliance and in-compliance cases;

(c) Ways and means to determine consequences;

(d) The bodies to take decisions on the above mentioned issues;

(e) The possibility of consideration of explanations submitted by a Party and its appeal from the decision determining its non-compliance;

(f) How to execute consequences;

(g) The possibilities to appeal from a decision on consequences;

(h) Withdrawal of consequences after determination that a Party is in compliance;

(i) The deadlines for determination of non-compliance and final decision. **(Poland)**

43. Both procedural and substantive non-compliance shall be subject to the compliance regime, including:

- Difficulties in implementing the Kyoto Protocol which might result in non-compliance.
- Non-compliance resulting of the use of the mechanisms of the Kyoto Protocol.

(Switzerland)

44. If it is focusing specifically on the that could lead to binding consequences, then the types of issues that should be addressed thereunder would be limited to those involving potential non-compliance with treaty obligations. If it is intended to refer more generally to the "compliance system" under the Protocol, then a much broader set of issues could be addressed, including raising questions about, and/or facilitating, implementation in a situation short of an alleged treaty violation. **(USA)**

B. Characteristics of commitments

45. The timing and character of the various commitments under the Protocol have already been differentiated in the text of the Protocol itself. Principles of proportionality could be further articulated to guide the compliance procedures and mechanisms as to how and when to take up issues related to compliance with specific commitments. For example, Annex I Parties' commitments under Article 3 are clearly among the Protocol's most important, and should attract the greatest attention, and the most serious non-compliance consequences. However, full compliance with these commitments cannot be assessed until the end of the commitment period. Nevertheless, procedures and mechanisms based on a preventative and precautionary approach should be able to take up issues related to potential non-compliance with Article 3, when concerns are raised prior to the end of the commitment period. **(AOSIS)**

46. The timing of commitments under the Kyoto Protocol varies. Some commitments are annual, some are at the end of a commitment period and others are continuous throughout a commitment period. The compliance system should be designed to operate in accordance with these different timing requirements. Some issues, e.g. relating to challenges to participation in the Kyoto mechanisms or the Article 6.4 procedure for Joint Implementation, will require speedy attention.

47. With respect to the character of commitments, some obligations are more central to overall compliance with the Protocol than others, for example a minor failure to meet the guidelines relating to reporting in the national communications is in a different category to a major breach of the rules for one of the Kyoto Mechanisms and its consequent effect on a Party meeting its Article 3 target.

48. It is expected that a grace period to work out ultimate compliance at the end of the commitment period will be necessary given the long time lag in collection of inventory data. Such a period would allow Parties the opportunity to take action on the basis of these figures to ensure compliance with the Protocol. A grace period would thus encourage compliance while maintaining the integrity of the Protocol. It would be built into the Protocol's compliance system. **(Australia)**

49. Some obligations can be assessed only at the end of the commitment period (Article 3), others, annually (Articles 5 and 7) while others may require more frequent assessments (non-compliance with respect to the Kyoto mechanisms). This means that while the sequence of events would be the same, different processes and timelines may be required. **(Canada)**

50. It is impossible at this stage to present a precise point of view as to how this procedure should make distinction between the timing and character of various commitments under this protocol. **(China)**

51. Various alternative preventive or response options would be appropriate for non-compliance with different commitments at different times. For instance, the procedure may need to differentiate between the pre-commitment period, the commitment period and the post-commitment period. **(European Union et al)**

52. The indicative list of consequences, which will be developed in consideration of the cause, type, degree and frequency of non-compliance, will serve as a useful tool to differentiate between the timing and character of various commitments under the Protocol.

53. The various commitments can be categorized as (1) central, and (2) subsidiary and procedural. Regarding QELROs-related central commitments, the COP/MOP should make a final decision on the basis of the outcome of the "Compliance Committee", while others could be handled by the "Compliance Committee". In case Parties question a decision of the "Compliance Committee", such issue could be appealed and discussed at the COP/MOP. **(Republic of Korea)**

54. The calculation of each Annex B Party's initial assigned amount will need to be reviewed as soon as possible and in any event before the start of the first commitment period to establish its definitive quantity. The review would need to be of the same rigour as the review of emissions in the commitment period (including adjustments where necessary).

55. Other rules would be required on determining the precise period beyond which a Party would be regarded as out of compliance and when the rules of procedure regarding any action under Article 18 would begin to apply. A "grace period" of, say, six months would be necessary to allow a Party to balance the books and to come into formal compliance. **(New Zealand)**

56. The procedure should determine particular commitments and consequences in case of non-compliance. It should allow for a certain delay in fulfilling obligations. In case of fulfilling of certain commitment after deadline it should determine when a Party is in compliance and should determine consequences. The procedure should state when the assessment of compliance should be undertaken. **(Poland)**

57. Since adoption of the Berlin Mandate, the clearly understood, essential purpose of the Protocol is to make progress in having Annex I Parties "take the lead in combating climate change and the adverse effects thereof". Especially for this reason, it is not appropriate to consider "binding consequences" for any non-compliance by developing country Parties of their commitments under Article 10, which are the only "commitments under the Protocol" by those Parties. If there ever were such non-compliance, it would be sufficient for the COP/MOP to consider the issues developed by an MCP and to implement programs (including financial assistance) to assist the developing country Party to cure the deficiencies.

58. There would be serious, practical problems in developing procedures concerning alleged non-compliance by a developing country Party with its commitments under Article 10. As is

clear from Article 4.7 of the Convention and Articles 10, 11.1 and 11.2 of the Protocol, the procedure leading to any conceivable determination of such "non-compliance" would require investigation and fact-finding as to whether the Annex II Parties had performed their commitments under Articles 4.3 and 4.5 of the Convention and Article 11 of the Protocol. Furthermore, the procedures would have to provide for investigation and fact-finding of the "special circumstances of developing country Parties", which "should be given full consideration", as required by Article 3.2 of the Convention. Especially in view of the limited financial resources of developing country Parties (and, also, the Convention processes), it is not feasible to put in place the complex and time-and-money-consuming procedures that would be essential to make those determinations, which would have to be a foundation for "binding consequences" imposed on a developing country Party. **(Saudi Arabia)**

59. Different cases of problems in implementing the commitments of the Kyoto Protocol should be treated in a differentiated manner. Non-compliance which affects the reduction commitments of Parties or the possibility to assess their substantive compliance could entail binding consequences, whereas other problems could be solved by facilitative measures. **(Switzerland)**

60. It is important to look at the various kinds of obligations under the Protocol (e.g., quantitative/qualitative, individual/collective (such as all Annex I Parties), annual/continuous/end of commitment period) in considering how compliance by Parties should be reviewed.

61. Concerning timing, for example:

(a) Some obligations run from the entry into force of the Protocol (such as those under Article 10).

(b) Some begin in 2007 (such as estimation of emissions under Article 5).

(c) Some are annual (such as reporting under Article 7).

(d) Some are periodic (such as targets under Article 3).

62. We need to ensure that the compliance/non-compliance regime we develop is capable of addressing obligations that arise in differing timeframes.

63. Concerning character of obligations, there could be a basis for differentiation both in terms of the applicable procedure and the applicable consequences:

For example, it would seem that the target obligations in Article 3 (the key obligations under the Protocol), as well as the integrally related obligations under Article 5 -

estimation of emissions - and Article 7 - reporting, would be amenable to a quasi-judicial procedure leading to binding consequences, whereas other obligations would not. **(USA)**

C. Provisions related to guidelines, etc.[3]

64. Conformity with each of these provisions will be a crucial aspect of Annex I Parties' efforts to remain within their assigned amounts under Article 3. Given the importance of these provisions, it will be essential for the Protocol's compliance system to be able to assess Parties' compliance, and to respond to any non-compliance, with them. The range of potential responses should include consequences that provide incentives and disincentives sufficient to ensure compliance. Parties found in non-compliance with these provisions should, in good faith, feel compelled to abide by any consequences approved by the Protocol's compliance system. **(AOSIS)**

65. As the principles, modalities, procedures, rules and guidelines (as appropriate) for the above provisions are still subject to negotiation, it is too early to decide which if any of these provisions should have binding consequences attached.

66. In the long run, legal analysis will be necessary to determine which aspects of the compliance system can be implemented via decisions under the Kyoto Protocol as it stands and which other aspects will require an amendment under Article 18 of the Protocol. However, we do not consider this an immediate issue facing Parties, nor do we think that it is an issue which should drive the development of the Protocol's compliance system. **(Australia)**

67. It is desirable that the compliance regime for the Protocol provides Parties with reasonably sufficient flexibility to build their national systems in the light of their special national circumstances. For this reason, coupled with the cooperative, facilitative, and preventive nature of the compliance system, non-compliance *de minimus* of the guidelines of Article 5.1 should not entail binding consequences.

68. Obligations under Article 6 constitute the integral part of the Kyoto Protocol Mechanisms, with which the compliance is significant to the successful implementation and application of the Protocol. Non-compliance with the guidelines for the implementation of Article 6 is a rather serious matter, and should entail binding consequences. For the same reason, our answer concerning "modalities and procedures" under the clean development mechanisms of Article 12.7 as well as "principles, modalities, rules and guidelines" under the emission trading of Article 17 is affirmative.

69. It is noted that the guidelines under Article 7.4 are used only for the preparation of the information required by under Article 7 and are subject to periodical review. An element of

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[3] Compliance with provisions related to Article 3, 4, 5, 6, 7, 12 and 17 (guidelines, principles, modalities, rules).

flexibility has thus been introduced *ex proprio vigore* to these guidelines. For this reason, non-compliance *de minimus* with the guidelines under Article 7.4 should not entail binding consequences. **(China)**

70. We consider that the compliance system should not be restricted to Article 18, but should also cover elements that facilitate compliance and prevent non-compliance. In view of this comprehensive nature of the system, we believe that the "guidelines, modalities, rules, principles and procedures" listed in Articles 3.4, 5.1, 6.2, 7.4, 12.7 and 17 will have an important bearing on the operation of the compliance system. They will, for example, have the effect of promoting confidence in, and ensuring the efficient operation of, the mechanisms. **(European Union et al)**

71. The procedures and mechanisms "entailing binding consequences" should, in principle, be adopted in all of the cases cited in this heading. However, when the procedures and mechanisms are applied, the nature of the obligations and the seriousness of the breaches based on the cause, type, degree and frequency of non-compliance should be taken into account. Furthermore, it should be noted that guidelines, modalities, rules, and principles mentioned above have not yet been elaborated upon. **(Republic of Korea)**

72. The starting point for the system of compliance at the international level must be the transparency and credibility of the reporting systems themselves. Accordingly, the relevant rules in the Kyoto Protocol need to be examined to determine what supplementary rules would be needed and what monitoring improvements would be desirable. Relevant aspects of other work being carried out under the Buenos Aires Action Plan also need to be examined with that in mind.

73. The reporting guidelines themselves should be clarified and standardised for all Parties before the start of the first commitment period. In this regard, reporting guidelines and common reporting format recently developed under the FCCC provide a useful starting point. **(New Zealand)**

74. The procedures and mechanisms "entailing binding consequences" should be adopted concerning non-compliance with respect to "guidelines" for the implementation of Article 6, as provided for in Article 6.2, "Modalities and procedures" concerning the clean development mechanisms, which may be adopted pursuant to Article 12.7, and "Principles, modalities, rules and guidelines" concerning emissions trading, which may be adopted pursuant to Article 17; but not with respect to "guidelines" for the national systems for estimating emissions of greenhouse gases and removals by sinks, which may be established pursuant to Article 5.1; and "guidelines" for the reporting of certain information in national communications, as provided for in Article 7.4.

75. With regard to "modalities, rules and guidelines" adopted pursuant to Article 3.4, concerning how, and which, additional categories of sinks may be added to those contained in

Article 3.3, we reserve our position after all issues related to Art. 3.3 and 3.4 will be resolved. **(Poland)**

76. "Guidelines" generally do not have mandatory characteristics, and they often involve flexibility of interpretation and application, as well as the exercise of judgments or discretion. Therefore, it would not be proper to impose "binding consequences" for non-compliance with a "guideline". This problem with imposing "binding consequences" for non-compliance with a "guideline" raises the issue of whether the language in Article 5.1 might complicate determinations of whether an Annex I Party was in compliance with its Article 3 commitments. This is because the "guidelines" to be adopted by the COP/MOP pursuant to Article 5.1 apply only to a national system for the "estimation of" emissions and sinks.

77. It is not clear how to relate the terms "modalities" and "non-compliance", and, therefore, it is not clear what would justify "binding consequences" for "non-compliance" with a "modality". "Principles" generally are broad statements of concepts, which often are capable of differing interpretations and which, although they may be the foundation for development of rules, lack the specificity and precision to warrant "binding consequences" for non-compliance with them.

78. If "binding consequences" were imposed because of non-compliance with anything other than "the provisions of this Protocol", that should occur only because of non-compliance with what specifically is designated as a "rule", because it is understood that "rules" set forth requirements, not merely recommendations. However, when an Article of the Protocol (such as Articles 5, I, 6.2, 7.4 and 12.7) gives the COP/MOP authority to adopt "guidelines" or "modalities" and "procedures", and does not refer to "rules", it would seem that the COP/MOP could not adopt "rules" pursuant to those provisions and that it should not adopt as "guidelines" requirements that really are "rules".

79. Article 18 refers to "procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol". Although, in theory, non-compliance with "rules" arguably should result in "binding consequences", the COP and the COP/MOP must give consideration to the serious issue of whether it is permissible to impose "binding Consequences" for non-compliance with anything other than "the provisions of this Protocol", as stated in Article 18. We are concerned that Article 18 does not use language that contemplates "binding consequences" for non-compliance with "the provisions of this Protocol and the rules (or guidelines, or principles, etc.) adopted to implement them", or words to that effect.

80. There also is the practical consideration that, if non-compliance with a "rule", "guideline", or "principle" could lead to "binding consequences", Article 18 would require amendment of the Protocol every time the rule, guideline, or principle was modified. We would be interested in learning the views of the other parties, especially including the reasons for their views, on these issues. **(Saudi Arabia)**

81. For all of these cases, both facilitative measures and binding consequences should be possible, depending on the nature and degree of non-compliance. Criteria to decide which measures would be adequate are, whether the non-compliance has any material impact on the reduction commitment or the assessment of compliance and the reasons of non-compliance. **(Switzerland)**

82. It is axiomatic that procedures and mechanisms "entailing binding consequences" could apply only to violations of legally binding obligations. (For these purposes, we would include requirements for participating in Kyoto mechanisms, even though, technically, such requirements are not obligations for a Party that chooses not to participate in such mechanisms). It would not be legally sound, and would not make sense, if binding consequences applied to a provision that was merely recommendatory; indeed, if binding consequences were to attach to such a provision, the provision would appear, by definition, not to be recommendatory.

83. Whether the provisions cited in this heading provide the basis for the COP or COP/MOP, as the case may be, to adopt legally binding obligations by decision is a separate question.

84. We are not of the view that a COP is inherently authorized to impose legally binding obligations on Parties through decisions. Rather, this authority must derive, if at all, from the language of the treaty provisions in question.

85. There are strong policy reasons why we should be seeking a result under which the provisions cited in this heading allow the adoption of decisions with at least a certain amount of legally binding content (beyond whatever non-binding elements might also be included).

86. We are considering the best way to accomplish this policy objective in a legally sound manner. **(USA)**

III. LINKAGES

General comments

87. We consider that there should be an early discussion about the respective roles and possible interaction of the different mechanisms referred to in the first instance (i.e. the compliance and the Article 8 expert review process). Parties should also look to the elements already included in the Protocol which might feed into or form part of a compliance system, and, with this foundation in place, then consider what more is needed to make the Protocol and its compliance system work. For example, Articles 5 (national systems and methodologies for the estimation of emissions and removals by sinks) and 7 (reporting of inventory and other information) will provide much of the information crucial to compliance assessment. **(Australia)**

A. Expert review process under Article 8 of the Kyoto Protocol

Role of the expert review team

88. The expert review process under Article 8 is intended to provide a "thorough and comprehensive technical assessment of all aspects of the implementation by a Party" of the Protocol. In order for such a process to meet this objective, its technical expertise and independence of judgement must be preserved. This means that, while issues identified by the expert review process might be taken forward by another procedure or institution entrusted with making a formal assessment of non-compliance, the two procedures should be kept distinct. The expert review groups should not be asked to form the legal or political judgements necessary for determining non-compliance.

89. The expert review teams should provide thorough and comprehensive technical assessment of each Annex I Party's compliance. This should include a clearly reasoned technical assessment of whether the policies and measures included in a national communication, when set against the national inventories of the Party concerned, indicate a trend that remains within the Party's assigned amount. **(AOSIS)**

90. The technical verification of Parties' inventories and reporting by the Article 8 expert review teams will play an important part in assessing whether Parties are on track to meet their commitments and identifying ways that their compliance may be facilitated.

91. We expect that the technical assessment to be performed under the Article 8 expert review process will form the first stage of the procedures under the compliance system. It will thus be an important element of the compliance system.

92. Article 8 provides initial advice on the roles to be played by the Protocol's institutions in the compliance system.

93. The Article 8 expert review process is mandated only to provide a thorough and comprehensive technical review of an Annex I Party's implementation of the Protocol. Expert review teams prepare their reports to the COP/MOP assessing Parties' implementation of commitments from a technical perspective based on this review. Expert review teams should not have a role in the legal or political assessment of whether Parties have met their Protocol obligations.

94. Expert review teams should operate in accordance with Article 8 and the guidelines to be adopted by the COP/MOP pursuant to this Article. **(Australia)**

95. Every effort should be made to ensure the credibility of expert review teams. Factual/technical assessments should be the extent of these teams' involvement in the compliance procedures. An expert review should not result in a finding of non-compliance: it

appears undesirable to burden the expert review teams with such authority since their aim is to produce factual, non-political, reports to ensure the credibility of the process under Article 8. On another issue, since expert reviews deal with target-related commitments (Annex B obligations), we may need another channel to assess non-Annex B obligations.

96. According to Article 8.2, experts do not necessarily come from Annex I Parties, let alone from governments. The powers of the review teams can be set out in guidelines to be adopted by the COP/MOP, at its first session, pursuant to Article 8.4. **(Canada)**

97. The expert review process constitutes part of the compliance/non-compliance procedure. Moreover, as the determination of compliance/non-compliance is contingent on the technical/factual assessment of the Parties' performance in meeting their obligations, the expert review process under Article 8 serves as a prerequisite for the successful operation of the procedure.

98. Although the expert review teams may provide information relevant to whether an Annex I Party is at risk of non-compliance or may not be in compliance, the teams should not have authority to make any determination (initial, provisional, or otherwise) that such Party is in non-compliance. As such determination may involve legal as well as policy issues, it should be done by an independent and impartial body.

99. A review team should not possess authority to initiate, by its own determination, a procedure adopted pursuant to Article 18 that could result in binding consequences to a Party. In our opinion, this body should be authorized to review matters of technical or factual nature only, like a fact-finding entity. **(China)**

100. It will be important to establish an automatic link between the review process and the compliance process. However, since the review teams only provide the factual basis for determining whether or not a Party is in compliance, the formal decision whether to proceed will be made by whatever body (e.g. a compliance committee) is authorized by the COP/MOP to assess compliance. One possibility is that the reports of the review teams should automatically be referred to the body authorized by the COP/MOP to consider non-compliance cases. **(European Union et al)**

101. The review process by expert review teams is an element of the compliance regime, which will provide factual and technical information regarding a Party's (non-) compliance.

102. It is not appropriate to authorize expert review team to make any determination with respect to non-compliance. Their role should be limited to a technical assessment of all aspects of the implementation by a Party of the Kyoto Protocol, and to prepare a report for the COP/MOP. **(Republic of Korea)**

103. Article 8.3 states that the expert review teams "shall provide a thorough and comprehensive technical assessment of all aspects of the implementation by a Party of this Protocol". It also states that the expert review teams "shall prepare a report to the Conference of the Parties serving as the meeting of the Parties to this Protocol (COP/MOP), assessing the implementation of the commitments of the Party and identifying any potential problems in, and factors influencing, the fulfilment of commitments". This shows that the expert review teams have an important function related to the compliance system of the Protocol. On the other hand, it should also be noted that the expert review teams are not mandated to determine and address cases of non- compliance. **(Japan)**

104. The Kyoto Protocol already has one review process, the review team process (Article 8), which would allow factual information regarding reporting and monitoring issues to be brought forward for international consideration. It would likely not be acceptable internationally among all Parties for this body to make assessments and trigger the automatic responses outlined above. **(New Zealand)**

105. Expert review should serve as the basis for the assessment of compliance. It could also indicate the causes of non-compliance and possible remedial actions.

106. The report of the review teams should provide the basis for determining if a Party is in compliance or not.

107. The expert review teams have authority to make initial determinations that such Party is in non-compliance.

108. The review team should determine, that according to the information provided by a Party, the Party is not in compliance with its commitments and describe those commitments as well as the nature of the breach. The procedure should precise the next steps. **(Poland)**

109. Subject to approval by the COP/MOP, the report of a review team, pursuant to Article 8.3, should trigger an MCP under Article 16, which would be an integral part of the procedures under Article 18. Although the report of the expert review team probably should be considered by the MCP, it does not necessarily follow that such report should be considered at later stages in the process.

110. The expert review teams does not have authority to make any determination that such Party is in non-compliance. At most, the review team's report could state that, based on the information in its report, the review team believes it would be appropriate to commence an MCP with respect to issues raised by the report. However, such statement would not mean that the MCP would proceed unless the COP/MOP so decides. **(Saudi Arabia)**

111. Expert review should be the main tool to assess compliance. Upon the findings of the Expert Review Teams (ERT) can be decided whether a non-compliance procedure should be

triggered. The teams should have authority to make any determination (initial, provisional, or otherwise) that such Party is in non-compliance. **(Switzerland)**

112. In developing the Protocol's compliance regime, it is important to bear in mind, as this question does, that we are not starting from scratch.

113. Concerning the relationship between the procedure and Article 8, the latter sets forth numerous aspects of a review process applicable to Annex I Parties. At the same time, as has been noted by many Parties, Article 8:

(a) Does not empower expert review teams to make formal determinations of, or respond to, non-compliance; and

(b) Does not apply to non-Annex I Parties.

114. As a result, with respect to Annex I Parties, the procedure would need to follow the Article 8 process, assuming the standard for triggering it were met. With respect to non-Annex I Parties, the procedure would seemingly not be at all related to the Article 8 review process. **(USA)**

Implications of Articles 8.3 and 8.5

115. It is anticipated that the reports of the expert review team will provide an important source of information on the performance of individual Parties. **(AOSIS)**

116. We expect that Articles 8.3 and 8.5 will form part of the procedures under the compliance system, of which Article 18 will also be a part. It is not clear that there should be a connection between Articles 8.3/8.5 and Article 16 as these provisions serve different purposes. Article 19 procedures should be considered separately. **(Australia)**

117. Article 8.3 of the Protocol states that the "review process [by expert review teams] shall provide a thorough and comprehensive technical assessment of all aspects of the implementation by a Party of this Protocol". Article 8.5 provides that the COP/MOP shall consider the information submitted by Parties under Article 7, the reports of the expert reviews thereon conducted under Article 8, the questions of implementation indicated in such reports, and any questions raised by Parties. Article 8.6 provides that pursuant to its consideration of this information, the COP/MOP shall take decisions on any matter required for the implementation of the Protocol.

118. Article 8.6 is crucial to determine the relationship between Article 8 and the compliance system. Under this Article, the COP/MOP could decide whether "pursuant to its consideration of the information referred to in" Article 8.5, a given case should be moved to the second step (legal and policy determination of compliance). This second step could be carried out by a distinct

body (see below under "institutional issues") or by the COP/MOP acting as such, possibly with the assistance of the SBI and, as appropriate, the SBSTA. With respect to the Kyoto mechanisms, if the COP/MOP meets only annually, a different process should be considered to move the compliance or, more precisely, the eligibility issue faster (and, presumably, without involving the COP/MOP) to the second step. Speedy resolution of such issues is essential to build market confidence. **(Canada)**

119. Timely, reliable and comprehensive reporting on the basis of Articles 5 and 7 is an essential element of the compliance system and is conducive to achieving compliance. In this regard, review of national greenhouse gas inventories and national communications undertaken pursuant to Article 8 should be treated as an integral part of the compliance system. The thorough and comprehensive technical assessment of the implementation by a Party of the Protocol, and questions arising from such an assessment, both form part of a comprehensive compliance system providing a factual basis for compliance/non-compliance determination. **(European Union et al)**

120. The requirements of Article 8.3 and 8.5 should be integrated with the procedures under Articles 18, 16, and 19 through the adoption of guidelines for the expert review teams at the COP/MOP 1. **(Republic of Korea)**

121. The requirements of Article 8.3 and 8.5 should be integrated with Articles 16 and 18. Subject to approval by the COP/MOP, the report of a review team, pursuant to Article 8.3, should trigger an MCP under Article 16, which would be an integral part of the procedures under Article 18. Further consideration by the COP/MOP of the information, reports, and Secretariat's list of implementation questions, referred to in Article 8.5, insofar as they concern a specific Party, should be deferred until the MCP is completed and a report thereon furnished to the COP/MOP by the body administering the MCP.

122. There is no apparent need to integrate Articles 8.3 and 8.5 with Article 19, except that the decisions of the COP/MOP concerning procedures for compliance/non-compliance, which are triggered by a review team report pursuant to Article 8.3, should make clear that resolution of disputes between Parties, pursuant to Article 19 of the Protocol, is without prejudice to full use of the compliance/non-compliance procedures under the Protocol. **(Saudi Arabia)**

123. We should integrate the requirements of Article 8.3 and 8.5 with the procedures that may be developed to implement Articles 18, 16, and 19, according to modalities and principles to be developed by COP/MOP. **(Switzerland)**

124. Article 8.3 and 8.5 are relevant to development of other compliance-related provisions of the Protocol. In this regard, the joint working group on compliance and the group dealing with elaboration of Articles 5, 7, and 8 need to coordinate closely.

125. In terms of how the various procedures should be integrated, Article 8.3 and 8.5 leave a gap. Expert review teams are empowered to assess implementation and identify potential problems influencing fulfilment of commitments, but they do not have the authority to make determinations of, or respond to, non-compliance.

126. COP/MOP consideration of implementation questions alone would not seem to fill the gap. By virtue of, *inter alia*, its size (all Parties) and meeting schedule (annual), it would not appear to be in a position to be the everyday forum for compliance-related issues.

127. Whether the COP/MOP should play a role at the end of the facilitative or enforcement procedure, and what role that would be, are issues that should be considered in the course of developing the compliance regime. **(USA)**

Whether Parties are precluded from raising questions if the report of the review team does not indicate non-compliance

128. The expert review team is intended to enhance, but not replace, Parties' individual or collective ability to raise issues with regard to the non-compliance of a Party. It would not seem appropriate to give the review teams the sole authority to provide the evidence on which an issue of non-compliance could be raised. **(AOSIS)**

129. Parties may raise questions of implementation separately from the expert review process under Article 8.5(b). The development of appropriate modalities and procedures is required. **(Australia)**

130. Our answer to this question is "No". However, when the separate body as suggested above considers the issue of non-compliance, however, it must take into account the report submitted by the review team. **(China)**

131. Every body authorized by the COP/MOP to trigger the compliance process should be free to raise an issue of non-compliance regardless of any conclusions reached by the review team; however, questions regarding the implementation of the Protocol must be accompanied with supporting information. In practice, action by a Party or the COP/MOP in triggering the compliance process is likely to be consistent with, or even inspired by, the findings of the review team. **(European Union et al)**

132. No. Any Party that has reservations regarding an other Party's implementation of its obligations under the Kyoto Protocol can raise an issue of non-compliance. **(Republic of Korea)**

133. Yes. The determination that a Party is in compliance with its commitments by a review team should be final. It should be confirmed by MOP. A party could only raise questions related to implementation of Art. 6, 12 and 17. **(Poland)**

134. No. A Party always should be able to raise an issue of non-compliance by another Annex I Party or an issue of its own compliance. A Party can also raise an issue of non-compliance related to Annex 1 transfer of technology and financial obligations. The review team may or may not have information available to it that is available to a Party, or it may interpret information or provisions of the Protocol differently than another Party. **(Saudi Arabia)**

135. No. **(Switzerland)**

B. Multilateral consultative process under Article 13 of the Convention

136. The procedures and institutions developed under the AG-13 process were tailor-made to deal with questions raised regarding the implementation of the Convention. Indeed, it should be recalled that the AG-13 mandate was expressly restricted from taking up issues related to the implementation of the Protocol, which was being negotiated in a parallel process. While the Convention and the Protocol share an objective, principles and institutions, they are fundamentally different in terms of the commitments they contain, and the compliance procedures they demand. For these reasons, it may be counterproductive to use the text of the Article 13 procedure as a point of reference for the design of compliance procedures under the Convention. **(AOSIS)**

137. The draft terms of reference for the multilateral consultative process under Article 13 of the Convention provide that questions of implementation would be taken up by the Committee if raised by a Party/group of Parties with respect to its/their own implementation, a Party/group of Parties with respect to another Party's/group's implementation or the Conference of the Parties. We would expect that a similar procedure would be applicable under Article 16 were the decision taken to apply the Article 13 process to the Protocol (except that the COP/MOP might substitute for the COP).

138. The possible application of the Convention's Article 13 Multilateral Consultative Process under Article 16 of the Protocol may potentially play a role in the Protocol's compliance system. Alternatively, this process could just as well operate separately to and without prejudice to the compliance system developed for the Protocol. Parties will need to address this issue as they consider the structure of the compliance system, but it is not an immediate priority for the compliance agenda. **(Australia)**

139. MCP might be used as an appropriate tool to address obligations other than those covered by the procedure. In addition, given the complexity and a certain degree of uncertainty in the performance of the protocol obligations, MCP might also be used as a desirable tool to avoid the invocation of non-compliance procedure, thus facilitating Parties to comply with their obligations under the Protocol. **(China)**

140. The MCP under Article 13 of the Convention will be considered at the COP/MOP as the multilateral consultative process for the Protocol. The multilateral consultative process for the Protocol will be involved in assisting a Party to comply with the obligations of the Protocol, whenever and at whatever stage this kind of assistance is required. However, it should be implemented without prejudice to the procedures and mechanisms established under Article 18. **(Republic of Korea)**

141. These procedures could constitute a „facilitative" part of the compliance procedure, and could provide advice to Parties. **(Poland)**

142. Until the MCP contemplated by Article 13 is decided by the COP, it is not possible to address this issue, concerning Article 13 of the Convention, beyond what has been stated in paragraph 190. **(Saudi Arabia)**

143. Elements of the MCP established under the Convention should, with the necessary adaptations to the needs of the Kyoto Protocol, be part of the compliance system. **(Switzerland)**

144. With respect to any procedure/institution adopted under Article 13 of the Convention (involving the so-called "MCP"), one could imagine a potential role for such a procedure/institution (applied and modified, as appropriate, under Article 16 of the Protocol) as part of the compliance system under the Protocol, particularly with respect to the more facilitative/preventive aspects of the regime. **(USA)**

C. Conference of the Parties serving as the meeting of the Parties to the Protocol

145. As the Protocol's governing body, the COP/MOP will have a central role in the compliance system. Conformity with its decisions may be subject to review under the compliance system. In some circumstances, it may be appropriate for the COP/MOP to decide to initiate some stage in the procedures, or to approve the outcome of the compliance system. **(AOSIS)**

146. The COP/MOP has a large role under Article 8: it is required to adopt guidelines for the review by expert review teams of information submitted by Parties under Article 7 and of the implementation of the Protocol (Articles 8.1 and 8.4); and it is to consider the information in the expert review teams' reports, the list of questions of implementation put together by the Secretariat and any other questions raised by Parties. **(Australia)**

147. If Parties decide to create a separate body, they will have to decide whether the compliance issue would first be "channelled" through the COP/MOP given that it "shall take decisions on any matter required for the implementation of the Protocol". In this regard, would the COP/MOP move a compliance issue further on its own or only upon a recommendation of the review team? Appropriate voting rules will be important for all COP/MOP decisions related to compliance by a Party. **(Canada)**

148. The Protocol stipulates that COP/MOP and the Convention's subsidiary bodies to play an essential role in the compliance system (cf. Article 8.5). COP/MOP, in particular, is authorised under Article 8.6 to make decisions necessary to promote the Protocol's effective implementation. Therefore, COP/MOP and the Convention's subsidiary bodies could be considered as a possible institution to determine and address cases of non-compliance. However, it is necessary to carefully examine whether these bodies are to be entrusted with the actual function to determine and address cases of non-compliance, taking into account their efficiency and mobility in decision-making. **(Japan)**

149. Regarding the determination of compliance, the COP/MOP should make a final decision on the basis of the outcome of the "Compliance Committee". The "Compliance Committee" should be allowed to have a certain degree of leeway to decide whether a case of non-compliance should be brought to the attention of the COP/MOP or it could be handled at the "Compliance Committee" level. In case Parties question a decision of the "Compliance Committee", such issue could be appealed and discussed at the COP/MOP. **(Republic of Korea)**

150. COP/MOP should take decisions on in-compliance, non-compliance and consequences. **(Poland)**

151. The COP/MOP should exercise ultimate review of each compliance/non-compliance proceeding, including serving as the body that must approve going forward with an MCP and any binding consequences imposed on an Annex I Party by the Compliance Committee. The COP/MOP should approve and review the outcomes of the Compliance System. **(Saudi Arabia)**

152. COP/MOP can trigger the procedure, elects the members of the Compliance Body and decides on measures and sanctions recommended by it; it supervises the Body, which reports to it on its work. **(Switzerland)**

153. There may be a role for the COP/MOP at the end of the compliance procedure(s). This will depend, in part, upon whether the enforcement prong of the compliance regime is given the final say as to determinations of non-compliance (and the applicable consequences, if it has any discretion in this regard. **(USA)**

D. Subsidiary bodies

154. The Subsidiary Bodies could play a role in assessing the effectiveness of the compliance procedure over time, but as their composition is identical to that of the COP/MOP, it is doubtful that their involvement in the compliance procedure itself would add value. **(AOSIS)**

155. The Subsidiary Bodies are to assist the COP/MOP in its duties. **(Australia)**

156. The subsidiary bodies, especially SBI, will consider the outcome of the "Compliance Committee" before the COP/MOP make a final decision thereon. **(Republic of Korea)**

157. SB should consider recommendation of the institutional arrangement and prepare recommendations for COP/MOP. **(Poland)**

158. On the request of the Compliance Body, the subsidiary bodies provide information about the issue of the procedure. **(Switzerland)**

159. The SBI and the SBSTA are given a compliance-related role in Article 8.5, namely to assist the COP/MOP in its consideration of expert review teams' reports and implementation questions. We would not envision much more of a role for these bodies, given that we would contemplate the establishment of new, dedicated bodies to deal with compliance. **(USA)**

E. Kyoto mechanisms

160. It can be argued that non-compliance with the conditions established for the use of the Kyoto mechanisms should be directly related to the mechanisms: failure to provide information required under Article 7 could lead to the temporary suspension of the right to trade emission units. In this regard, the elaboration of the Protocol's provisions relating to the Kyoto mechanisms should be seen as an opportunity to prevent issues of non-compliance through the use of eligibility criteria as prerequisites to participate in the mechanisms. **(Canada)**

161. Some Parties appear to be taking the position that Parties should not be allowed to participate in the Protocol's mechanisms under Articles 6, 12, and 17 unless they are first "bound" by a non-compliance regime. This position does not appear to make legal sense. The Protocol allows a Party to join without being bound by any non-compliance regime, i.e., it does not have to ratify any ultimate Article 18 amendment. (As noted above, while procedures/consequences relating to particular mechanisms could be included in the rules for such mechanisms, these seemingly could not include procedures/consequences relating generally to Article 3 targets). Thus, a Party can, consistent with the Protocol, exceed its target without being bound by a non-compliance regime/consequences. (It should be noted that this was not the U.S. position at Kyoto, but our objective of including the consequences for exceeding targets in the Protocol itself was not supported by others). If a Party were not permitted to participate in mechanisms under Articles 6, 12, and 17 unless it had joined the non-compliance regime, a Party that exceeded its target and had used JI, CDM, or emissions trading would be bound by the non-compliance regime; in contrast, a Party that exceeded its target and had not used JI, CDM, or emissions trading would not be subject to any non-compliance regime. This would be an absurd, and discriminatory, result.

162. It might be argued that mechanism-users should be bound by mechanism-specific compliance regimes. But, even then, why would such mechanism-specific compliance regimes apply only to emissions trading, JI, and CDM? Why not also to any form of flexibility under the

Protocol, including Article 4? Moreover, would it make sense to have compliance regimes that applied to the various means of helping to achieve targets without a compliance regime for exceeding targets themselves? **(USA)**

F. Executive board of the clean development mechanism

163. Until the functions of this body are determined, it is difficult to speculate what role it might play in a compliance procedure. It may well have information of relevance to the compliance of Parties with their obligations under Article 12 or Article 3, or be in a position to draw the attention of the compliance procedures to issues related to compliance with Article 12. **(AOSIS)**

164. Article 12 provides some initial guidance as to the role of the executive board of the clean development mechanism (CDM), which we expect will be further elaborated in the modalities and procedures to be set out for the CDM. We would not envisage the CDM executive board having a role in the compliance system apart from its responsibilities in the CDM context. **(Australia)**

165. The executive board of the CDM will supervise the operation of the CDM and try to ensure that CDM rules and guidelines are observed. **(Republic of Korea)**

166. The executive board of the clean development mechanism: inform the institutional arrangement on non-compliance related to CDM. **(Poland)**

167. The roles of this institutions will depend on further discussion of the objectives, nature, and structure of the compliance /non-compliance process. **(Saudi Arabia)**

168. CDM: On the request of the Compliance Body, it provides information about the issue of the procedure as far as related to the CDM. **(Switzerland)**

169. The CDM institutional structures outlined in Article provide for the review of particular projects as to their "compliance" with CDM requirements. Any non-compliance procedure that we establish will presumably not be re-reviewing the validity of previously certified emissions reductions. **(USA)**

G. Operating entity of the financial mechanism

170. It may be appropriate, in certain circumstances, to invite the operating entity of the financial mechanism to provide relevant information related to resources that may be available to assist eligible Parties to comply, or information relevant to other Parties' commitments to provide financial resources. **(AOSIS)**

171. The operating entity of the financial mechanism will be consulted by the "Compliance Committee" to draw up measures against non-compliance, in case the case can be addressed through financial assistance. **(Republic of Korea)**

172. The operating entity of the financial mechanism- to provide assistance to eligible Parties. **(Poland)**

173. The roles of the other institutions identified in the question will depend on further discussion of the objectives, nature, and structure of the compliance /non-compliance process. **(Saudi Arabia)**

174. The operating entity of the financial mechanism may be able to play a role with respect to the facilitative aspect of the compliance regime, particularly concerning a Party that is experiencing implementation problems due to a lack of financial capacity. **(USA)**

H. Secretariat

175. Secretariats have played essential roles in the operation of compliance procedures under other regimes. The role the Secretariat may play in the Protocol procedures may vary from stage to stage in a graduated system. While secretariats have been authorised, under various procedures to initiate compliance procedures, and in others to provide information and support during the decision-making process, it may not be appropriate for a secretariat to perform both of these functions within some stages of the procedure. **(AOSIS)**

176. The Secretariat is to list questions of implementation indicated in reports by the expert review teams for further consideration by the COP/MOP. **(Australia)**

177. We believe that, since the Secretariat is most likely to have information on cases of non-compliance, there could be a certain role for the Secretariat in initiating the procedure for addressing and determining non-compliance. However, care will need to be taken to ensure that the Secretariat is not thereby placed in an invidious position. The Secretariat should assist the compliance body to perform its functions. **(European Union et al)**

178. The secretariat will play a role in initiating a procedure under Article 18 against a non-compliance case, and supplying information and materials required by the "Compliance Committee". **(Republic of Korea)**

179. The secretariat's role should be confined to providing existing information that is requested by a Party or by a body involved in the compliance/non-compliance process and to making logistical arrangements pursuant to the request of the relevant body involved in the process or pursuant to procedures developed by the COP/MOP. It should not develop information or analyses or express views concerning the subject matter of a proceeding. At all

times the secretariat should be regarded as the servant of all of the Parties and, therefore, it must be scrupulous in neither "taking sides" in the process nor appearing to do so. **(Saudi Arabia)**

180. The secretariat: technical and procedural. **(Poland)**

181. Secretariat: It distributes information on the Expert reviews pursuant to Art. 8 para. 3 Kyoto Protocol and provides administrative support to the Body. **(Switzerland)**

182. The Secretariat will, at a minimum, be involved in the Article 8 review process. According to that provision, the Secretariat is to coordinate expert review teams, as well as list questions of implementations indicated in expert review teams' report for further COP/MOP consideration. As the rest of the compliance system develops, there may be other appropriate roles. **(USA)**

I. Settlement of disputes under Article 19 of the Kyoto Protocol

183. The Parties to the Convention have yet to develop the dispute settlement procedures, including the arbitration and conciliation procedures, called for under Article14 of the Convention. These will also be relied upon under Article 19 of the Protocol. AOSIS and other Parties have highlighted the potential need for more formal means for the resolution of compliance issues, and the JWG should explore the potential usefulness of ad hoc binding arbitration, or conciliation procedures to fit this purpose. **(AOSIS)**

184. The Article 19 dispute resolution provision should receive separate attention due to its specific function. Action under Article 19 should be initiated only by a Party involved in a dispute. It is important that such disputes be considered by a body qualified to deal with legal disputes. **(Australia)**

185. Any compliance system will be designed without prejudice to Article 19 of the Protocol. Compliance does not aim to resolve a dispute arising between two or more Parties but to provide means to ensure that Parties meet their commitments. While a sound compliance system should assist in avoiding disputes between Parties, the process under Article 19 is a separate matter: whether to have recourse to dispute settlement is a decision that must be left to the Parties. **(Canada)**

186. As to the relationship between the procedure and Article 19 of the Protocol, we suggest to leave it for future considerations, due to the complexity of the question. **(China)**

187. With regard to the relationship between the compliance procedure and the settlement of disputes, we note that in key precedents compliance procedures are applied without prejudice to dispute settlement procedures. We consider, however, that the circumstances of the Kyoto Protocol may justify taking a different approach. **(European Union et al)**

188. The procedure under Article 18 should be applied without prejudice to the procedures under Article 19 of the Protocol. This traditional dispute settlement procedures under Article 19 could be employed to resolve any disputes between Parties regarding the interpretation or application of the Kyoto Protocol. **(Republic of Korea)**

189. Procedure under Art. 19 could apply to disputes among Parties on issues related to Art. 6, 12 and 17. **(Poland)**

190. Difficult issues arise concerning the relationship between Articles 18 and 19 of the Protocol. This is because Article 19 applies Article 14 of the Convention (Settlement of Disputes) to the Protocol; and Article 14 of the Convention concerns a dispute between as few as two Parties regarding "interpretation or application of the Convention" (and, therefore, the Protocol); yet "non-compliance [by a Party] with the provisions of this Protocol", which is the subject of Article 18, is a matter of concern to all Parties to the Protocol. If Party X believes it is aggrieved by Party Y's non-compliance with a provision of the Protocol, the settlement of their dispute pursuant to Article 14 of the Convention/Article 19 of the Protocol, even though satisfactory to them, may or may not be satisfactory to the other Parties to the Protocol. The decisions of the COP/MOP concerning procedures for compliance/non-compliance should make clear that resolution of disputes between Parties, pursuant to Article 14 of the Convention/Article 19 of the Protocol, is without prejudice to full use of the compliance/non-compliance procedures under the Protocol. **(Saudi Arabia)**

191. Settlement of disputes: different procedures with different objectives. **(Switzerland)**

192. Regarding Article 19 of the Protocol, which applies the Framework Convention's dispute settlement provisions to the Protocol, we would view this Article as an element of the Protocol's compliance system. In the Framework Convention context, it has been thought that the dispute settlement provisions and the MCP under Article 13 would operate without prejudice to each other. However, there may be more of an issue under the Protocol if an element of the compliance system is to be a more judicial, enforcement-oriented procedure. (For example, if we decide that the multilateral quasi-judicial procedure can be invoked by an individual Party in respect of another Party, should the first Party be able to invoke the bilateral dispute settlement procedure simultaneously?) This issue should be further considered as we develop the procedure. **(USA)**

IV. COMPLIANCE PROCEDURE

General comments

193. The institutional arrangement to be put in place under the Protocol's compliance system should be in keeping with the compliance system's objectives of compliance-pull and facilitating compliance. It should be structured in a manner that assists Parties in meeting their commitments under the Protocol. For example, the institutional arrangement should be geared in

the first assistance to offer support to Parties in correcting compliance problems, both during the grace period and after. It will also need to be readily accessible and responsive to Parties' needs, and should integrate appropriate technical and legal expertise. **(Australia)**

194. There should be three steps to the compliance process. First, a technical/factual assessment of a Party's compliance with specific provisions of the Protocol. This should be followed by a legal/policy determination of compliance. Lastly, an "outcome" should result from the determination: depending on the issue, various consequences including facilitative suggestions, could be made or imposed. This "outcome" does not necessarily have to be a "binding consequence" adopted pursuant to, and requiring an amendment under, Article 18 of the Protocol.

195. With respect to the composition of the body responsible for a finding of non-compliance (the second step), there are several options to consider. As mentioned above, such a body could be the COP/MOP acting as such, possibly with the assistance of the SBI and, as appropriate, the SBSTA. A separate standing body could also be established. Depending on the issue, this body might refer some matters to an ad hoc body or another standing body to deal with fast track issues or cases where guidance is sought. If Parties decide to create a separate body, they will have to decide whether the compliance issue would first be "channelled" through the COP/MOP given that it "shall take decisions on any matter required for the implementation of the Protocol"? In this regard, would the COP/MOP move a compliance issue further on its own or only upon a recommendation of the review team? Appropriate voting rules will be important for all COP/MOP decisions related to compliance by a Party. The extent to which all Parties to the Protocol should participate in the assessment of compliance with obligations applicable only to a limited number of Parties should also be determined. **(Canada)**

196. The question of whether an institutional arrangement is necessary must be approached from the standpoint of making the best use of the already built-in compliance mechanisms of the Protocol and what deficiencies there exist, if any, and how to fill the gaps.

197. To ensure the transparency and credibility of the compliance system, the function and mandate of the institution need to be clearly defined. We must also ensure that the institutional arrangement fulfil its role fairly and efficiently. **(Japan)**

198. The question of whether an institutional arrangement is necessary must be approached from the standpoint of making the best use of the already built-in compliance mechanisms of the Protocol and what deficiencies there exist, if any, and how to fill the gaps. In other words, what is required of the compliance system is how to supplement those substantive provisions already built in the Protocol that require the Parties to comply.

199. There are a number of institutional arrangements under the Kyoto Protocol, related to compliance in a broad sense, such as expert review teams under Article 8, multilateral consultative process under Article 16, and dispute settlement under Article 19. Questions of

institutional issues need to take into account these existing institutions, including the roles and functions of each institution and their inter-relationships. The institutional arrangement, if it is to be created, should be characterised by cost-effectiveness, efficiency, due process of law and predictability. The following points should also be taken into account.

200. These should be simple and cost effective, building on existing institutions where necessary and appropriate. **(New Zealand)**

201. The "institutional arrangement" presupposed by this response involves: (i) the expert review team referred to in Article 8; (ii) a Party that might seek to initiate the compliance/non-compliance process; (iii) the COP/MOP, which would determine whether the MCP would go forward: (iv) the MCP; (v) the Compliance Committee, which, in the case of failure of the MCP to achieve a satisfactory result, would make the determinations of (A) whether there was non-compliance and failure of the Party in question to abide by the recommendations developed by the MCP and (B) the binding consequences to be imposed; and (vi) ultimately, the COP/MOP. **(Saudi Arabia)**

A. <u>One procedure or more than one procedure</u>

202. More than one "procedure" is already anticipated under the Protocol. For example, the expert review procedure under Article 8, while it may be linked to further procedures, is in many ways self-contained, and has its own "institutional" arrangements and characteristics. It may be that, as the compliance system is developed further, specialised procedures will be appropriate to deal with different aspects of the system. For example, ad hoc or standing procedures or institutional arrangements may prove to be necessary to deal with issues that require highly specialised technical expertise, or to deal with issues that require judicial or quasi-judicial expertise and procedures. All of these procedures and institutional arrangements will, however need to be part of a single integrated procedure that ensures their coherent and consistent application. **(AOSIS)**

203. A compliance system is more than a non-compliance system. The latter will address, potentially in a punitive way, non-compliance with some or all obligations under a treaty. A compliance system, on the other hand, will emphasise facilitation as well as prevention and set out appropriate processes and responses that may differ according to the type of obligation and the degree of non-compliance, irrespective of any ultimate consequences that the system may provide. Canada believes in the importance of a "compliance approach". We must assume that Parties comply with their obligations and build a system where non-compliance will have to be proven. This may require more than one procedural track. **(Canada)**

204. Given the complexity and special character of each mechanism, there is obviously a need for more than one procedure to deal with compliance/non-compliance elements of the Kyoto Mechanisms. On the other hand, it is equally important to maintain the integrity and simplicity of the compliance system. Therefore, it is desirable to have sub-procedures created within the

general procedure for dealing with compliance elements of the mechanisms in Articles 6, 12, and 17. **(China)**

205. The compliance system should function, as far as possible, through one single set of procedures, incorporating both a facilitative and a judicial approach. Such a system would apply to the obligations in the Protocol and to obligations laid down, inter alia, in respect of the Kyoto mechanisms: the latter being as much a part of the comprehensive compliance system as the former. Whilst there is much valuable work that can, and should, be done right away with regard to the development of a comprehensive compliance procedure, further work is needed on how that procedure should function in detail in relation to the Kyoto mechanisms, since the rules and procedures relating to those mechanisms are still to be defined. **(European Union et al)**

206. In principle, one comprehensive and integrated procedure is appropriate. **(Republic of Korea)**

207. There would need to be a two step process. First, an international "Review Body" would be needed to assess the findings of the review team, in a timely fashion, and notify the Party concerned of the results of its assessment and to make determinations correcting any problems. Following that notification, which would include a grace period to rectify problems, the automatic consequences outlined above would follow. This process should be seen as largely technical in nature, with Parties being confined to supplying factual and technical information only. In principle, most problems should be solvable through this process and at this level.

208. Where the automatic consequences did not bring a Party back into compliance, there would need to be a further process. This should be a formal dispute settlement process, set up under Article 18, to apply any further consequences that may be needed. This would also apply to any Party that did not use the Kyoto Protocol mechanisms. The consequences should also be limited to the suspension of rights and privileges arising within the Kyoto Protocol itself. Under Article 18 procedures, however, suspensions might be tailored to the severity of the individual breach. Such an approach would maintain credibility whilst also retaining a desirable flexibility in the system. This process should allow a Party the opportunity to have a full and fair hearing under the standard rules of due process before any binding consequences were imposed under Article 18. **(New Zealand)**

209. One procedure should be sufficient. **(Poland)**

210. We prefer an "integrated procedure", which begins with basic information gathering, moves to an MCP, and, only if necessary, ends up with fact-finding (that would be a foundation for imposition of binding consequences) and imposition of such consequences. The proposed relationship between the MCP and the procedure for imposing binding consequences is summarized in paragraph 201. The entire process should be integrated with the provisions of Articles 8.3, 8.5, and 8.6 of the Protocol.

211. When there is apparent non-compliance or apparent risk of non-compliance by a Party, the system should be designed to work with the Party in question through an MCP to determine: (i) whether there actually has been non-compliance (or is serious risk of future noncompliance); (ii) the causes thereof; and (iii) the steps the Party should take to avoid or cure noncompliance. If the Party fails to take recommended steps and non-compliance occurs or continues for specified amounts of time, the procedures should result in imposition of financial penalties, subject to review and approval by the COP/MOP.

212. Any Party should be able to raise an issue of non-compliance by another Party, and any Party should be able to seek the assistance of the compliance process in meeting its obligations under the Protocol. The portion of the expert review process described in Articles 8.1 and 8.3 could be the most common trigger of the compliance/non-compliance process under Article 18; however, initiation of the MCP should be subject to prior approval of the COP/MOP pursuant to Articles 8.5 and 8.6. Subject to COP/MOP approval, the MCP should be undertaken (i) when the report of an expert review team identifies with respect to a Party what Article 8.3 calls "any potential problems in, and factors influencing, the fulfillment of commitments", or (ii) upon the complaint by one Party that another Party is in non-compliance with the Protocol, or (iii) upon the request of any Party raising an issue concerning its own compliance with the Protocol. The consideration by the COP/MOP of the information, reports, and Secretariat's list of implementation questions (referred to in Article 8.5) and its taking decisions (pursuant to Article 8.6) initially should be limited to determining whether the MCP should proceed in light of criteria to be established by the COP/MOP.

213. If the MCP proceeds, pursuant to authorization of the COP/MOP, the body administering the MCP should submit reports to the COP/MOP on the progress being made in the MCP and at the conclusion of the MCP. If the MCP body's report indicates that the MCP is not achieving its objective (averting threatened non-compliance or curing actual non-Compliance) and that the Party in question has failed or refused to follow the recommendations of the MCP, the COP/MOP should decide whether the matter should be forwarded to the "Compliance Committee". The COP/MOP should not take further decisions, pursuant to Article 8.6, until the part of the compliance/ non compliance process administered by the "Compliance Committee" has been completed. **(Saudi Arabia)**

214. For the sake of coherent decisions in different cases a single procedure within one specialised body is preferable. **(Switzerland)**

215. We would suggest that the form of the procedure follow the function(s) of the compliance system.

216. It appears to us that two of the compliance system's functions may not be amenable to being handled by the same procedure, namely:

(a) The facilitative function (which might apply to both potential violations of legally binding obligations and implementation more generally); and

(b) The enforcement function (which will involve a more judicial role, particularly if it leads to binding consequences).

217. We are reviewing examples from other areas of international law to see if they can inform the discussion about the appropriate treatment of these disparate functions.

218. Our answers to the institutional questions below presume different institutions for addressing, on the one hand, facilitative aspects of the compliance regime and, on the other hand, enforcement aspects of the compliance regime. It may not be appropriate for the same institution to perform two such very different functions:

(a) Vesting these two functions in the same body could prejudice its work with respect to either function.

(b) The institutional competence for each feature would differ. For example, an enforcement function (at least one leading to binding consequences) involves more judicial scrutiny than a facilitative function.

(c) While a facilitative function could be carried out by a body composed of representatives of Parties, it should at least be considered whether it would be advisable/desirable for the enforcement function to be carried out by Party representatives.

219. In terms of the more judicial procedure, we would contemplate that such procedure would focus on certain obligations under the Protocol, namely quantitative targets (as well as inventory-related requirements under Articles 5 and 7, whose function is to demonstrate compliance with such targets). The relevant obligations would be the various components that need to be calculated and reviewed in order to assess whether a Party has complied with its target; these are reflected in the attached chart (see page 67 below):

(a) On the left side of the equation is "emissions", which refers to emissions during the commitment period. It should be noted that the Protocol is not based on actual emissions, but rather on estimation of emissions based on agreed methodologies. The way a Party demonstrates its emissions is by using the estimation methodologies under Article 5 and then reporting its results under Article 7.

(b) On the right side of the equation is "assigned amount". Emissions on the left side must be less than or equal to assigned amount.

(c) Assigned amount is calculated by beginning with original assigned amount, i.e., 5 years times the percentage for that Party inscribed in Annex B times its baseline emissions (Article 3.7). The baseline can vary in several ways, depending upon whether a Party is a country with an economy in transition (Article 3.5), has chosen 1995 for three gases (Article 3.8), and/or qualifies for including net land-use change (Article 3.7).

(d) Original assigned amount can then be modified in several ways:

(i) It might increase or decrease depending upon sink-related changes during the commitment period (Articles 3.3 and 3.4).

(ii) It might increase or decrease depending upon the acquisition or transfer of joint implementation reduction units (Articles 6, 3.10, and 3.11).

(iii) It might increase or decrease depending upon the acquisition or transfer of units of assigned amount under emissions trading (Articles 17, 3.10, and 3.11).

(iv) It might increase depending upon the acquisition of CDM reductions (Articles 12 and 3.12).

(v) It might increase or decrease depending upon banking (increasing if tonnes have been carried over from a previous commitment period, decreasing if tonnes are being carried over into the next commitment period) (Article 3.13).

(e) Whether the more judicial procedure would have the final word on non-compliance (and on consequences, if it had any discretion in this regard) or whether its findings would go elsewhere, for example, to the COP/MOP, needs further consideration.

(f) We attach a flow chart (see page 68 below) to illustrate how such a system might work. In some cases, we have noted an issue without including an answer to promote discussion. **(USA)**

B. Sub-procedure for the Kyoto Protocol mechanisms

220. Our early thinking is that a sub-procedure within the compliance system's general procedure may be necessary to deal with compliance elements relating to the mechanisms due to the need for expedited outcomes on some issues, such as the result of a challenge under Article 6.4 or to the participation requirements. **(Australia)**

221. It is desirable to have sub-procedures created within the general procedure for dealing with compliance elements of the mechanisms in Articles 6, 12, and 17. **(China)**

222. A compliance system would apply to the obligations in the Protocol and to obligations laid down, inter alia, in respect of the Kyoto mechanisms: the latter being as much a part of the comprehensive compliance system as the former. Whilst there is much valuable work that can, and should, be done right away with regard to the development of a comprehensive compliance procedure, further work is needed on how that procedure should function in detail in relation to the Kyoto mechanisms, since the rules and procedures relating to those mechanisms are still to be defined. **(European Union et al)**

223. It seems to be too early to determine whether a sub-procedure within a general procedure is needed for the Kyoto Mechanisms because the rules, modalities, and guidelines for the Kyoto Mechanisms are still currently under discussion. **(Republic of Korea)**

224. Articles 6, 12 and 17, which respectively provide for joint implementation, clean development mechanism and emissions trading, are an important parameter on the question of compliance. For example, Article 6.4 provides that "any such units (emission reduction units) may not be used by a Party to meet its commitments under Article 3 until any issue of compliance is resolved". We should take into account the ongoing negotiations on the Kyoto Mechanisms because they will inevitably and significantly deal with compliance-related matters. Whether one integrated procedure is sufficient or a separate procedure is needed for dealing with compliance elements of the mechanisms is a very important issue to be addressed. **(Japan)**

225. Pending learning the views of other Parties, it may not be appropriate to have a "sub-procedure" for dealing with "compliance elements of the mechanisms" in Articles 6, 12, and 17. **(Saudi Arabia)**

226. In terms of whether a separate or sub- procedure is needed for dealing with compliance elements of emissions trading, joint implementation, and the CDM, we would answer this question as follows:

(a) Depending upon how one defines a "procedure" for dealing with compliance elements", one might argue that the Protocol already sets forth a mechanism-specific procedure with respect to the CDM. Specifically, the institutional structures outlined in Article 12 provide for the review of particular projects as to their "compliance" with CDM requirements. Any non-compliance procedure that we establish will presumably not be re-reviewing the validity of previously certified CERs.

(b) Beyond the CDM example, it is not clear that it would make sense to create a proliferation of mechanism-specific compliance procedures. We would note that, with the exception of host country participation in CDM, the mechanisms of emissions trading, joint implementation, and the CDM are simply various means to an end, i.e., of achieving quantitative commitments under Article 3. As such, they are elements of the overall formula for calculating compliance with Article 3 targets (see formula in chart form in March 1 U.S. submission on

compliance). This formula includes other elements as well, such as Articles 3.3 and 3.4, Article 4, Articles 5 and 7, etc. It would seem anomalous to create a separate procedure(s) to assess compliance with certain individual pieces of the target formula.

(c) If a particular mechanism has eligibility requirements for participation, it might be argued that there should be a separate, perhaps expedited, procedure to resolve an issue raised about a Party's consistency with such requirements. However, given that such requirements are likely to involve compliance with Articles 5 and 7 (as this requirement is already set forth in Article 6 and has been proposed by many Parties with respect to emissions trading rules under Article 17), it is questionable whether a whole new procedure should be established to review what the non-compliance procedure will already review in the context of Article 3 targets. **(USA)**

C. Eligibility to raise questions

227. Any Party should be able to initiate any aspect of this procedure with regard to the non-compliance or potential non-compliance of another Party. In designing a graduated and proportionate response to non-compliance, a staged series of procedures of increasing seriousness may be desirable. In this circumstance it may be appropriate to allow the expert review team to recommend, or the Secretariat to initiate, some stages of this process, while leaving to the Parties alone the ability to initiate other stages of this process. Furthermore, if aspects of the process take on a judicial or quasi-judicial aspect, it may be necessary to put in place certain procedural and evidentiary burdens on those wishing to initiate the process, to ensure there is some basis in fact and in law for triggering the procedure. **(AOSIS)**

228. As set out above, we envisage that the Article 8 expert review process would form the first stage in the compliance system. Article 8.5(b) is also relevant. **(Australia)**

229. Who should be able to initiate a procedure for determining and addressing non-compliance with the Protocol will have to be assessed, among other factors, in light of the potential consequences included in the system. However, one could argue that compliance procedures are triggered by an Article 8 review. A Party should also be able to request assistance/advice directly from any compliance body that may be established. **(Canada)**

230. Either a Party or Parties should be able to initiate such a procedure. Such a procedure may also be initiated by COP/MOP. **(China)**

231. The following Parties or Protocol institutions should be able to initiate a procedure for addressing and determining non-compliance:

(a) A Party or a group of Parties with respect to its or their own implementation;

(b) A Party or a group of Parties with respect to the implementation by another Party or group of Parties;

(c) Institutions or bodies established/serving under the Kyoto Protocol. **(European Union et al)**

232. We should look into the question of who is eligible to initiate the procedure for determining and addressing cases of non- compliance. Although there could be a number of prima facie candidates, such as (i) expert review teams under Article 8 of the Protocol and (ii) a Party, we need careful consideration of their eligibility. At any rate, when available, an assessing report by the expert review teams pursuant to Article 8.3 must be given due consideration in determining cases of non-compliance. **(Japan)**

233. A Party that has reservations regarding another Party's compliance can initiate a procedure under Article 18 for determining and addressing the cases of non-compliance with the Kyoto Protocol. The Secretariat should also be allowed to initiate the procedure under Article 18. **(Republic of Korea)**

234. The review team, the body under the compliance procedure, subsidiary bodies of the convention/ protocol. **(Poland)**

235. Depending on what is meant by "initiate", the review team (by means of its report pursuant to Article 8.3) or any Party could "initiate" an MCP, which is the first, essential part of the "procedure for determining and addressing non-compliance with the Protocol", however, the COP/MOP would determine whether the MCP would proceed. Whether or not there would be a <u>further</u> procedure for determining and addressing non-compliance with the Protocol would depend on the outcome of the MCP.

236. Any Party should be able to raise an issue of non-compliance by another Party, and any Party should be able to seek the assistance of the compliance process in meeting its obligations under the Protocol. The portion of the expert review process described in Articles 8.1 and 8.3 could be the most common trigger of the compliance/non-compliance process under Article 18; however, initiation of the MCP should be subject to prior approval of the COP/MOP pursuant to Articles 8.5 and 8.6. Subject to COP/MOP approval, the MCP should be undertaken (i) when the report of an expert review team identifies with respect to a Party what Article 8.3 calls "any potential problems in, and factors influencing, the fulfilment of commitments", or (ii) upon the complaint by one Party that another Party is in non-compliance with the Protocol, or (iii) upon the request of any Party raising an issue concerning its own compliance with the Protocol. **(Saudi Arabia)**

(a) Parties with respect to their own compliance.
(b) Parties with respect to another Party's or other Parties' compliance.

(c) The Compliance Body.
(d) The COP/MOP.

237. The Secretariat and the ERT (expert review team) may issue recommendations to the Compliance Body. **(Switzerland)**

238. The answer to this question may depend upon which compliance-related "procedure" we are referring to.

239. Article 19 incorporates by reference a dispute settlement procedure that can be triggered by any Party in respect of another.

240. If we fill out the Protocol's compliance system by elaborating more than one procedure, for example, one more facilitative and one more judicial, we may want different triggers for such procedures. The trigger for a "lighter" procedure might be correspondingly easier to meet than that for a procedure that could lead to binding consequences.

241. Options for initiators include, for example, expert review teams (with respect to Annex I Parties only), the COP/MOP, the Secretariat, a Party in respect of itself, a Party in respect of another Party.

242. The almost completed MCP under Article 13 of the Framework Convention, which falls at the facilitative end of the compliance spectrum, would permit triggering by Parties with respect to themselves and Parties with respect to other Parties. A similar approach might be taken with respect to the facilitative aspect of the compliance regime, noting that the role of expert review teams with respect to Annex I Parties would need to be taken into account.

243. The harder question would be the trigger for the more judicial/enforcement procedure that could lead to binding consequences. In our view, such procedure would be triggered if an expert review team's fact-finding raised a non-compliance issue within the meaning of the Article 8 guidelines. Such guidelines should provide that the team should give a Party the opportunity to cure a problem, if that is appropriate (such as if a particular inventory category were missing an element).

244. Concerning end-of-commitment-period compliance, the referral might work as follows. If there were confidence in a Party's measurement and reporting (which would be known from annual review of inventories and assigned amounts, as well as from periodic in-depth reviews), then the only step that would be required at the end of a commitment period is a final evaluation to ascertain whether total reported emissions are less than or equal to adjusted assigned amount. This evaluation would occur automatically as part of the annual review and accounting of assigned amounts by Article 8 expert review teams. Referral to the judicial/enforcement procedure would appear to be necessary only if there were a lack of confidence in a Party's

measurement and reporting or if (taking into account the need for a true-up period, see below) the annual review indicates that emissions exceed the Party's assigned amount. **(USA)**

Whether the expert review process under Article 8 should initiate compliance procedure

245. A review team should not possess authority to initiate, by its own determination, a procedure that may be developed to implement Article 16. **(China)**

246. The review team should not possess authority to initiate, on its own determination, a process that could - by its very nature - result in binding consequences. **(European Union et al)**

247. No. In consideration of the role of the review team as mentioned in the response to question no. 8(b), the fact that a review team possesses authority to initiate a procedure under Article 16 and 18 is beyond a task of a review team. **(Republic of Korea)**

248. A review team possess should have the authority to initiate, by its own determination, a procedure adopted pursuant to Article 18 that could result in binding consequences to a Party. **(Poland)**

249. A review team should not possess authority to initiate, by its own determination, a procedure adopted pursuant to Article 18 that could result in binding consequences to a Party. But it may issue recommendations to the Compliance Body, which acts as the institutional arrangement further defined under Aticle 13. **(Switzerland)**

D. Sources of information

250. Any institutional arrangement established under this procedure should have the right to seek or to receive and consider information from any source it deems appropriate. Any Parties involved or concerned in the procedure should have the right to have access to and to respond to any information that has informed the deliberations. **(AOSIS)**

251. With respect to sources of information, the body responsible for performing the legal/policy assessment should have before it:

(a) The information submitted by Parties under Article 7;

(b) The reports of the expert reviews conducted under Article 8;

(c) Depending on the role given to the COP/MOP under Article 8.6, any decision it has taken on a given case;

(d) Additional information provided by the Party concerned.

252. Where a Party applied on its own to the compliance body to obtain assistance, the body would have before it information provided by the Party concerned and any other information deemed useful to resolve the problem such as, for example, individual consultants reports. **(Canada)**

253. The sources should include as following:

(a) Reports submitted by the review team under Article 8;
(b) Presentations by a complaining Party or Parties; and
(c) Presentations by the complained Party or Parties. **(China)**

254. The compliance body should consider any information forwarded to it. In order to assist it in the performance of its functions, the compliance body should be entitled to request further information on matters under its consideration from the Party/body that triggers the compliance process or the Party in respect of which the process is commenced. **(European Union et al)**

255. The main sources will be national inventory data and communications, and reports by expert review teams. Additional information can be obtained tnrough the Secretariat. Publications and statistics by International Organizations may also be used as supplementary information. **(Republic of Korea)**

256. Governments of the states-Parties to the UNFCCC/Protocol, intergovernmental organisations, non governmental organisations. **(Poland)**

257. It is not clear whether the term "sources" is used to refer to entities or people, as distinguished from documents or publications; nor is it clear what is meant by "such an institutional arrangement".

258. The "sources" of information to be considered by these different parts of the "institutional arrangement" might vary. For example; although the report of the expert review team probably should be considered by the COP/MOP (in making its determination as to whether there should be an MCP) and by the MCP, it does not necessarily follow that such report should be considered at later stages in the process. It would seem that, at all stages in the process, the Party in question should be allowed to present information. As a general proposition, it would seem that the answer to this question depends on whether the COP/MOP believes that credibility and reliability of information is better assured by establishing criteria or rules for use of information or by leaving it to fact-finding/decision-making bodies to determine for themselves the weight to be given to different types of information. More informed consideration of this complex issue of "sources of information" should await further discussion of the structure of the compliance/non-compliance system. **(Saudi Arabia)**

259. ERT (expert review team).
Other Convention bodies.

Additional information submitted by Parties.
Any available and reliable source of information.
Independent experts. **(Switzerland)**

260. The answer might depend upon the procedure or body in question. It might be appropriate to permit a wider range of sources of information in the more facilitative procedure, whereas the more judicial/enforcement procedure might be more limited. At a minimum, in both cases, the Party in question would have to be given the opportunity to present whatever relevant information it wished. **(USA)**

E. Standing/Ad hoc body

261. As has been indicated, the process may require both standing and ad hoc institutional arrangements. A standing committee of limited membership capable of reviewing the issues related to the compliance of individual Parties would, however, provide an essential institutional core of any compliance procedure developed for the Protocol. **(AOSIS)**

262. Given the decisive role it plays in determining whether a Party or Parties comply with its obligations under the Protocol, such an institutional arrangement should be standing in nature. **(China)**

263. The compliance body should be a standing body, since it has an important task to fulfill under the Kyoto Protocol, and moreover it is foreseen that its task will be a constant one. A standing body will also have the opportunity to develop consistent practices and an evenness of approach to its work that will be in the interest of effective supervision of compliance by Parties with their obligations. **(European Union et al)**

264. In taking cost effectiveness into consideration, it should be an ad hoc body and active only when it is called into action. **(Japan)**

265. Given the potentially large workload and the importance of ensuring continuity and consistency of work, a standing body, which could be named the "Compliance Committee", should be established. **(Republic of Korea)**

266. Standing. **(Poland)**

267. An ad hoc committee should be sufficient. **(Saudi Arabia)**

268. Standing. **(Switzerland)**

269. It seems that the institutional arrangement(s) for both the facilitative and enforcement aspects of the regime should be standing in nature:

(a) The compliance aspects of the Protocol are vital to its effective functioning and should have the prominence that standing (as opposed to ad hoc) bodies reflect.

(b) It would seem desirable to avoid having to constitute a body(ies) each time an issue arose.

(c) The existence of a standing body(ies) could contribute to continuity, efficiency, and confidence in the regime. **(USA)**

F. Size, composition and expertise

270. Its size will depend in part on the number of Parties to the Protocol. It should be small enough to be functional, but large enough to represent the diversity of Parties.

271. It should be composed of individuals with scientific, technical or legal expertise in issues covered by the Protocol. Its members should be appointed by governments, and should act in their personal capacities. **(AOSIS)**

272. Assuming that separate bodies are set up, would the bodies responsible for the second (and third) steps be composed of independent experts or governmental representatives? In either case, the individuals serving on such bodies should be well-qualified with a mix of technical, policy and legal expertise. To assist in the selection of experts, the secretariat could maintain an indicative list of individuals possessing the appropriate qualifications. **(Canada)**

273. From perspectives of cost-efficiency and simplicity, the size of such an institutional arrangement should not be very large. Also the composition of such an institutional arrangement should be based on equitable geographical representation.

274. The expertise of the members should be based on their merits in technical and legal fields related to the implementation of Convention and Kyoto Protocol. They should also serve the body only in their personal capacity. **(China)**

275. We also believe that the compliance body should be of limited size and be composed of persons who are experts of recognized competence in relevant fields, such as those of science, socio-economics and law. It should be allowed to draw upon advice from such outside expertise as it deems necessary. Members should be elected by the COP/MOP for a period of at least 3 years, and should serve in a personal capacity. A provision should be made to make it possible for those who are elected to serve for two consecutive terms. **(European Union et al)**

276. In order to attain efficiency and low cost, the size of the institutional arrangement is a decisive factor. Expertise in science and technology, economics, law and other relevant fields are called for. Whether such experts are Party representatives or individuals representing

themselves is a question to be approached from the standpoint of ensuring transparency, predictability, fairness and consistency. **(Japan)**

277. In order to maintain efficiency the "Compliance Committee" should consist of a limited number of members, for example, 10 or so as in the case of the Implementation Committee of the Montreal Protocol. The election of members should be based on the principle of equitable geographic distribution.

278. Members, who will serve according to their personal expertise and merits, should be experts in relevant fields, such as those of law, inventory, science, socio-economics, and the environment. **(Republic of Korea)**

279. The body should consist of representatives of Parties from Annex B and non-Annex B Parties in equal numbers. Within both groups regional groups should be represented in equitable manner. The size should be no larger than 20 members.

280. The members should be elected in their personal capacity with due geographic balance. Their expertise depends on tasks to be implemented by this body and should be determined after the objectives and task of the body are decided. **(Poland)**

281. The size of the body that administers and facilitates the MCP could consist of 15 persons, so as to enable three persons to represent each of the five U.N. regional groups. In the event the MCP fails, the "Compliance Committee" would determine (A) whether there was non-compliance and failure of the Party in question to abide by the recommendations developed by the MCP and (B) the binding consequences to be imposed. The"Compliance Committee"could consist of four representatives of each of the five U.N. regional groups.

282. Rules should be developed as to when a Party should be disqualified to participate in the administration of a given MCP and on the Compliance Committee's consideration of a case.

283. Determination of what expertise should be required probably depends on the structure of the compliance/non-compliance process and the nature of the responsibilities of each of the bodies involved in that process. If "ad hoc" bodies are used at any stage of the process, the required expertise also may depend on the nature of the specific issues involved in a given matter. Regardless of professional background (e.g., science, economics, technologies, law, etc.), members should have a good understanding of the basic principles on which the compliance/non-compliance process is based. Such experts must be nominated by parties.

284. The view may be expressed by some that members of these bodies serve "in their individual capacities". That view may more nearly reflect idealism than reality. **(Saudi Arabia)**

285. Small Body (12 to 15 members) of Experts, elected by the COP/MOP, representing equitable geographical distribution. For questions regarding non-compliance with Art. 3 Kyoto Protocol, the Body could be enlarged by additional experts from Annex I countries.

286. Experts in technical and legal fields related to the implementation of the UNFCCC and the Kyoto Protocol, acting in their personal capacity. **(Switzerland)**

287. The "facilitative" institutional body should be of limited membership (i.e., it should not be open-ended) and should be composed of Party representatives. The balance between Annex I and non-Annex I representation will need to be discussed.

288. The body that is of a judicial character and whose determinations of non-compliance can trigger binding consequences would also have a limited membership. As noted above, it should at least be considered whether this body should be composed of Party representatives or of independent third parties.

289. The expertise would depend upon the procedure or body in question:

(a) A facilitative body would require a certain amount of technical expertise in order to assess implementation problems and promote solutions.

(b) A more judicial body/enforcement would require legal expertise and possibly also technical expertise (whether directly through its members or indirectly through access to such expertise), given the many ways in which assessing implementation of quantitative targets could involve technical issues. There might be an issue, for example, concerning a Party's use of methodologies or baselines, or whether the rules for a particular mechanism had been followed. The procedure and the members of any body would need to be capable of reviewing such issues. **(USA)**

G. Frequency of meetings

290. This would depend on the amount of work such a committee would be charged with. It should meet, as a matter of course, in conjunction with the regular meetings of the subsidiary bodies and the Conference of the Parties serving as the meeting of the Parties. It should have the discretion to call extraordinary meetings should they prove to be necessary. **(AOSIS)**

291. Once a year, at least. **(China)**

292. The compliance body should, unless it decides otherwise, meet twice a year. Further, it should report on its activities to the COP/MOP on a regular basis. **(European Union et al)**

293. It would be appropriate for the standing body to meet biannually, unless it decides otherwise, in conjunction with the biannual meetings of UNFCCC Subsidiary Bodies. **(Republic of Korea)**

294. Twice a year after deadlines for certain commitments (e.g. after deadline for submission of inventories) or more often if there is such a need. **(Poland)**

295. It should convene during the sessions of the COP/MOP. **(Saudi Arabia)**

296. At least once a year, as often as necessary. **(Switzerland)**

297. More details about the procedure(s) we are designing will need to be known before an informed view could be given on this point. For example, frequency of meetings could depend on the type of authority vested in a body. **(USA)**

H. Rules of procedure

298. A graduated procedure, based on several stages, and drawing upon more than one institutional arrangement, may also require different sets of rules of procedure. Common to all aspects of the process should be rules that ensure transparency, the full participation of all Parties concerned, and access to all relevant information. As stages in the process take on a judicial or quasi-judicial character, heightened standards of due process may need to be developed. It must however, be kept in mind that many of the precedents for rules of due process associated with judicial or quasi-judicial procedures are based on bilateral, and adversarial conflicts. Due process is often guaranteed through procedures that ensure equal treatment of the disputants, and that balance the rights of a "complainant" and a "respondent".

299. The multilateral character of the Protocol's rules may require a unique blend of procedures that draw upon both multilateral and bilateral models, and that anticipate the possibility of decisions including, non-compliance responses, resulting from procedures of a non-confrontational, non-adversarial process. **(AOSIS)**

300. To ensure transparency and due process, Parties concerned must be able to fully participate in the assessment of their compliance. **(Canada)**

301. We suggest that rules of the procedure should be elaborated by COP/MOP. In order to ensure the due process and the transparency of its operation, each member of the body should have one vote. Moreover, this body should make a decision or determination strictly on the basis of relevant provisions of the Convention and the Protocol, particularly the procedure under Article 18 of the Protocol. Parties concerned have the right to participate in the proceedings and to present their views. **(China)**

302. With regard to due process and the transparency of the compliance procedure, we are of the view that a Party in respect of which a submission or a referral is made should be entitled to participate in the process of consideration by the compliance body of that submission or referral, but should not take part in the preparation and adoption of any decision of the body. Further, decisions and reports of the compliance body should be made available to all Parties and to any person upon request. The information exchanged by or with the compliance body should also be available to any Party upon its request. However, the confidentiality of any information received in confidence will need to be secured. **(European Union et al)**

303. Due process and transparency could be better ensured by establishing clear operational rules including providing the Party concerned opportunities to explain and furnish information about the matter, and to participate in the deliberation stage of the "Compliance Committee". In addition, as much information as possible should be available to any Party who has interest in the matter in question. **(Republic of Korea)**

304. Rules of procedure should be decided after determination of objectives and tasks of the body. Decisions should be taken by consensus, and in case it would not be possible, according to the procedures on voting adopted for MOP. The documents for the meetings of the body as well as reports from its meetings should be made available to the Parties. **(Poland)**

305. These questions are better answered when there has been more complete discussion of the principles underlying the compliance /non-compliance system, its objectives, nature and structure. However, all decisions made by bodies involved in the system must be by consensus. **(Saudi Arabia)**

306. Parties concerned can participate fully in the process and can submit information. Final deliberations within the Body take place without participation of the Parties concerned to ensure independence of the members of the Body. The Body decides whether there is compliance or not and makes recommendations to the COP/MOP on possible measures or sanctions to be taken. **(Switzerland)**

307. In terms of the facilitative procedure, the issue of rules of procedure may not arise because of, among other things, its informal nature.

308. Concerning the more judicial/enforcement procedure, rules would seem to be necessary to guide its functioning. Such rules might address, for example, the types of evidence or information that would be made available to the relevant body; how and under what circumstances information other than that provided by expert teams and by Parties could be used; which Parties or groups could file briefs or make arguments before the body; time limits for filings; procedures for the Party to reply to factual or legal contentions raised before the body; procedures for appeal, if any; selection of members of the body; voting and quorum rules. **(USA)**

V. CONSEQUENCES OF NON-COMPLIANCE

A. General comments

309. The compliance system should be designed so as to use the most effective approach to promote or bring full compliance of all Parties. It is still too early to determine the kind of consequences that would be most appropriate to achieve that objective. That being said, it should be noted that multilateral environmental agreements usually do not include punitive elements, the emphasis being rather placed on facilitation to prevent non-compliance. In this regard, the importance of Articles 5 and 7 and "peer pressure" cannot be underestimated. However, it has been suggested by some Parties that punitive elements are required in the specific context of the Protocol in view of its potentially considerable financial consequences and the need to ensure the credibility of the market-oriented Kyoto mechanisms. **(Canada)**

310. The outcome, or aim, of a compliance system should be to bring about full compliance with the Protocol. As we have stated in our earlier submissions, compliance should as far as possible be promoted through incentive measures, since they are most in the interest of the environment. Incentives and sanctions in general should be applied in a graduated manner. The objective of the comprehensive compliance system should be to resolve questions regarding the implementation of the obligations under the Kyoto Protocol by means *inter alia* of:

(a) Providing advice to individual Parties in implementation of the Protocol;

(b) Overcoming difficulties encountered by individual Parties in implementation of the Protocol;

(c) Preventing non-compliance from occurring;

(d) Preventing disputes from arising; and

(e) Imposing consequences, including sanctions, where appropriate, if a Party fails to fulfill its obligations under the Protocol.

311. The compliance procedure should differentiate between the character of various commitments by providing for a system of consequences to be applied in a graduated manner, and in a way that is proportionate to the nature of the obligations to which they relate as well as the cause, type, degree and frequency of non-compliance. Moreover, there should be a differentiation when it comes to deciding in which cases and under what circumstances the application of specified consequences will be automatic. **(European Union et al)**

312. It should be noted that various kinds of obligations/requirements exist in the Protocol. Violations or failures of these obligations vary, ranging from light to serious ones. Accordingly,

it is necessary to consider consequences in proportion to the nature and extent of violations or failures of each obligation.

313. Furthermore, it is necessary for the compliance system to have a function to facilitate compliance in itself. For example, some Parties may find it difficult to comply with provisions of the Protocol, especially Article 3, due to the lack of capacity. In such a case, it would be important that the compliance system contains elements to assist such Parties.

314. In any case, our primary concern in this question of "consequences of non-compliance" should be how to facilitate compliance rather than what penalties to impose as a consequence of non-compliance.

315. Taking the above points into account, we must decide the following two points: (i) what are obligations/requirements which should entail consequences for non-compliance, and (ii) what are specific consequences to ensue. **(Japan)**

316. A wide spectrum of possible consequences, taking into account the cause, type, degree and frequency of non-compliance, should be developed in the form of an indicative list. The following consequences can be considered among others: appropriate assistance; issuing cautions; suspension of specific rights and privileges under the Protocol; and financial penalties. **(Republic of Korea)**

317. The procedure adopted under Article 18 should include the list of consequences and the list of commitments that if not fulfilled will constitute non-compliance cases. **(Poland)**

B. Automatic consequences

318. There would be great benefit in identifying in advance the range of consequences that might be associated with non-compliance. AOSIS looks forward to specific proposals from Parties as to how these consequences might be associated with specific categories of non-compliance.

319. AOSIS reserves its position on the issue of application of automatic penalties until more details are forthcoming on what is meant by "automatic" penalties and how they would be applied. **(AOSIS)**

320. Parties' need for reasonable certainty with respect to the consequences of non-compliance will need to be balanced against the need to take into account "the cause, type, degree and frequency of non-compliance". Consequences should be in keeping with the compliance system's objectives of encouraging compliance-pull and facilitating compliance. A menu of possible responses to compliance problems might be developed focussed on the objective of bringing Parties into compliance. Such a menu might include different response options for different types, cause, degree and frequency of compliance problems.

321. The issue of "automatic penalties" is a difficult one to address in the abstract. Consequences under the compliance system will need to strike a careful balance between discretion and automaticity. While automatic responses have a deterrent value and provide certainty, they are difficult to reconcile with the need to take into account different types, cause, degree and frequency of compliance problems. Parties might want to build the necessary flexibility into the compliance system to take into account a failure to meet their obligations due, for example, to circumstances arising unexpectedly during the commitment period which could not have reasonably been foreseen (such as a natural disaster). **(Australia)**

322. We submit that successful operation of the compliance system depends on its reasonable certainty so that every Party is aware in advance of consequences of non-compliance. This requires that each type cases of non-compliance be associated with specific consequences in advance. To ensure that, an indicative list of a full range of potential cases of non-compliance and that of consequences proportionate and responsive to these cases should be designed, taking into account the cause, type, degree, and frequency of non-compliance. This task, in turn, is conditioned on the clear identification of the various obligations covered by the procedure. Moreover, such lists should be open-ended due to the impossibility to exhaust all the potential cases of non-compliance in advance. In the present stage, however, it is difficult to decide what type of cases of non-compliance are associate with what specific consequences. Having said that, the indicative list of consequences should include, at least, the following aspects:

(a) Appropriate assistance, including technical and financial expertise and capacity building;

(b) Issuing cautions;

(c) Suspension of rights, including ability to participate in the Protocol Mechanisms under Articles 6, 12, and 17; and

(d) Penalties, including financial penalties.

323. An effective compliance system as envisaged should focus on a facilitative approach to cases of non-compliance. Bearing this in mind, in designing the regime, emphasis should be placed on positive measures of assistance to help overcome problems and difficulties in implementation of compliance. On the other hand, circumstances causing non-compliance may vary very much. Indifferent application of "automatic" penalties may put the principles of fairness and equity in jeopardy. Therefore, it is more desirable for an institution to consider each case individually and to apply the appropriate response measures. However, this does not preclude Parties from further exploring the possibility of imposing automatic consequences in certain circumstances of cases of non-compliance. Having said that, we suggest to leave this question for future considerations. **(China)**

324. In order to provide legal certainty, it would be desirable to determine in advance specific consequences with regard to particular non-compliance situations. The specification of particular consequences in advance would not only increase transparency and equity but it will also have a deterrent effect that will give an incentive for proper implementation of the obligations under the Protocol. **(European Union et al)**

325. The compliance system should provide reasonable certainty and automaticity. Parties must know in advance what consequences will ensue for a particular violation. Reasonable expectation of consequences in advance will provide proper incentives to comply and promote equal treatment among Parties. Automaticity in the determination of consequences, taking into account the cause, type, degree and frequency of non-compliance, will ensure the predictability and credibility of the compliance system. **(Japan)**

326. The idea of automatic penalties is valuable in that it guarantees predictability. However, automatic penalties should be only used in limited cases which are clearly stipulated in the Kyoto Protocol and agreed upon at the COP/MOP. **(Republic of Korea)**

327. One of the pre-conditions proposed for participation in international emission trading and in the other mechanisms is that a Party be in compliance with its reporting obligations under Articles 5 and 7 of the Kyoto Protocol (as required under the Kyoto Protocol irrespective of whether the Parties choose to use the mechanisms.) Accordingly, one automatic consequence of this would be that if a Party failed to comply with this particular requirement, wholly or in an important area, then it would be subject to a determination that it had not complied and could be suspended from trading until it had remedied the defect. This follows from having to comply with reporting obligations in the first place and would be a powerful incentive for Parties to remain in compliance with Articles 5 and 7. Before receiving a determination, it would be necessary for a Party to have the opportunity to be heard on the issue and have a short period in order to come into compliance. Any determination should also be able to be appealed to the dispute settlement body (please see para 18 below), although the prohibition on selling would continue during the period of appeal.

328. As a further automatic consequence, an adjustment needs to be made to an Annex B Party's record of emissions during the commitment period if their inventory estimates and/or reporting are found to be unacceptably inaccurate or if data is missing. This would help to ensure the integrity of the compliance process.

329. The central obligation in the Kyoto Protocol provides for Parties to ensure that emissions do not exceed their assigned amounts. The Protocol does not explicitly state, however, how this is to be assessed and what should happen if Parties fail to do this. The means of assessment should be made explicit. If Parties are using the mechanisms in Articles 4, 6 12 and 17, it should be expressly stated that if a Party's actual emissions exceed the number of units of account equivalent to their assigned amount then the Party has an issue of compliance on which to respond. It should further be made explicit, as general rule, that if a Party's actual emissions

exceed their assigned amount as expressed in comparable units of account then that Party would be liable to make good the difference. These additional requirements would enhance the transparency of compliance and its legal certainty.

330. Further, if after the grace period, a Party has still not been able to comply with its obligation, then a Party might have the option of further purchases at a penalty rate or of an automatic deduction from its next emissions budget, again at a penalty rate, possibly a higher one to reflect the inter-temporal nature of this activity. **(New Zealand)**

331. - Inventory not submitted on time
- Lack of national system under Art. 5.1
- Emission exceeding the assigned amount
- if Art.2.1 is not implemented.

332. Automatic penalties may be used in case of lack of national system for estimation of anthropogenic emissions, and annual inventories or national communications being not reported on time. **(Poland)**

333. Probably no types of non-compliance should be associated with specific consequences in advance, except for the imposition of financial penalties in the event an Annex I Party is found to be in non-compliance with the Protocol after having failed to take actions to avert or to cure the non-compliance that were recommended by the MCP. **(Saudi Arabia)**

334. Apart from the cases already determined by the Kyoto Protocol (cf. Art. 6 para 4), it will be up to the COP/MOP to establish a coherent practice which takes into account all relevant aspects.

335. We wonder whether "automatic" penalties are flexible enough to enable adequate responses to the different circumstances under which non-compliance can happen. **(Switzerland)**

336. Specific consequences should be known in advance when they will be binding.

337. We would support developing specific consequences in advance for non-compliance with quantitative targets, including various components of the target formula (for example, measurement and reporting obligations, mechanism rules).

338. For example, Article 6 makes clear that a consequence of not being in compliance with Articles 5 and 7 is that a Party may not acquire JI units. We and other Parties have suggested an analogous consequence related to emissions trading.

339. Consequences for exceeding the target after an assumed true-up period should be designed so as to promote the environmental effectiveness of the Protocol (for example, by

restoring excess tonnes to the system). As will be recalled, the United States proposed at Kyoto that any excess tonnes be subtracted from a Party's assigned amount for the subsequent commitment period, with a penalty (at a rate designed to make overages unattractive). We are open to considering other proposals.

340. There needs to be a certain level of automaticity to the system with respect to binding consequences:

(a) It is more likely that the advance notice of consequences (provided, of course, that they are reasonably stringent) will deter non-compliance than unknown consequences.

(b) It is not reasonable to ask a State to agree in advance to be bound by an unknown consequence; further, ratification in many States would be complicated if it could not be said what the consequences would be for Annex I Parties whose emissions exceed their assigned amounts.

(c) If a non-compliance body had discretion to impose consequences, it might be reluctant to impose any meaningful consequence when an actual case arose; in addition, imposition of a discretionary consequence might be overly politicized.

(d) Advance agreement on binding consequences can help ensure equal treatment of non-complying Parties and thereby further lend legitimacy to the process.

341. For these reasons, we start from the presumption that there should be limited (if any) discretion in the application of the consequences. **(USA)**

Approving or reviewing the application of automatic consequences

342. The concepts of "approving" and "reviewing" and that of "automatic" seem contradictory. **(Australia)**

343. As an answer to this question depend on the outcome of the exploration of the possibility to impose automatic consequences, we thus feel it premature to answer it now. **(China)**

344. Drawing on accumulated expertise, the procedure or institutional arrangement may express its views on any automatic non-compliance responses, which will be a valuable contribution to the deliberations of the COP/MOP. **(Republic of Korea)**

345. All automatic responses should be approved by the institutional arrangement. **(Poland)**

346. The COP/MOP should review and approve all binding consequences, Its decision should be final. **(Saudi Arabia)**

347. We would favor an approach at the "automatic" end of the spectrum. However, we also recognize that there may be a need to consider whether individual circumstances might ever warrant deviation from an automatic response. We are open to discussing whether it would be appropriate, in particular circumstances, to deviate from the automatic non-compliance response. **(USA)**

C. Financial penalties

348. Financial penalties, if backed by a mechanism authorised to assess and to collect them, could serve the dual purpose of deterring non-compliance, and of making available resources for investment in mitigation and adaptation projects. **(AOSIS)**

349. The objective of the compliance system should be to bring Parties into compliance with their obligations. Financial penalties would not be conducive to this objective. **(Australia)**

350. Financial penalties should be used in serious non-compliance cases, such as exceeding assigned amount of emission under Article 3. Financial penalties should be made available to meet the cost of adaptation. **(China)**

351. Our primary concern in this question of "consequences of non-compliance" should be how to facilitate compliance rather than what penalties to impose as a consequence of non-compliance.

352. Financial penalties should be considered as one option to guard against non-compliance. The proceeds can be used for assisting developing countries adaptation to the adverse effects of climate change and/or the impact of the implementation of response measures. And they can also be channeled into GHG reduction projects of developing countries, which can contribute to the ultimate objective of the UNFCCC. **(Republic of Korea)**

353. We do not support the idea of financial penalties. Financial penalties could constitute part of the bilateral agreements between Parties concerning JI, CDM and emission trading. **(Poland)**

354. Financial penalties should be used if an Annex I Party is found to be in non-compliance with the Protocol after having failed to take actions to avert or to cure the non-compliance that were recommended by the MCP. If the subject of non-compliance is exceeding the Party's assigned amount for the commitment period, the amount of the penalty should be calculated by multiplying the excess emissions by a fixed monetary amount. If the subject of non-compliance is another provision of the Protocol, perhaps there should be a minimum financial penalty, in the circumstance referred to in paragraph 333 with authority to raise the penalty in light of the facts and circumstances attending the non-compliance. As a rule of thumb, financial penalties must exceed the costs of meeting an Annex B obligation under the Protocol. Financial penalties that

are imposed would continue to be owed even though the Party has withdrawn from the Protocol pursuant to Article 27.

355. The financial penalties should be used to provide funding to meet the needs identified by the COP pursuant to Articles 4.8 and 4.9 of the Convention and Articles 2.3 and 3.14 of the Protocol. **(Saudi Arabia)**

356. Financial penalties should be used in very serious cases of repeated non-compliance, where the Party concerned does not make the necessary and possible efforts to overcome its difficulties.

357. Proceeds of financial penalties should be used to promote the objectives of the compliance system. **(Switzerland)**

358. We would not favor financial penalties as a consequence for non-compliance. **(USA)**

VI. IMPLICATIONS OF ARTICLE 18 OF THE KYOTO PROTOCOL

359. AOSIS strongly believes that all Parties to the Protocol should feel compelled to act in good faith, and in conformity with decisions resulting from a compliance system that has been duly adopted and authorised by the COP/MOP. **(AOSIS)**

360. We consider it inappropriate to address this question at this stage. We note however that the requirement for an amendment to the Protocol in order to adopt any binding consequences creates problems of certainty for Parties, as no Party ratifying the amendment can be certain that all other Parties will do likewise. This would result in inconsistency in the application of the Protocol's compliance system. This is an issue requiring further discussion.

361. It may however prove possible, if Parties deem it appropriate, to agree to binding consequences related specifically to the Kyoto mechanisms in the rules and procedures to be adopted for these mechanisms. **(Australia)**

362. The key question that remains unanswered is whether to adopt binding consequences under Article 18 before determining whether facilitative means would suffice to address potential non-compliance issues. Thus, the compliance system could first be built around Article 8 of the protocol, the procedures and mechanisms adopted under Article 18 (including an indicative list of consequences) and possible sanctions included in the rules elaborating the Kyoto mechanisms. If necessary to better ensure compliance, this position could be revised in subsequent commitment periods. **(Canada)**

363. Depending on the nature of obligations under the Protocol, non-compliance with the central obligations, obligations to the Protocol Mechanisms, and other obligations which are important to the meeting of the central obligation should entail binding consequences. Binding

consequences by nature should refer to such consequences as are caused by more serious non-compliance, thus being subject to punishment for the purpose of deterrence and reparation, whereas other consequences of non-compliance should be those which can be dealt with through facilitative measures. The implication of the amendment for binding consequences under Article 18 implies that, unless otherwise decided by COP/MOP, any procedures and mechanisms under this article entailing binding consequences shall be adopted by means of an amendment to the Protocol. **(China)**

364. The compliance system should not be restricted to Article 18, but should also cover elements that facilitate compliance and prevent non-compliance. **(European Union et al)**

365. Whether the consequences of non-compliance are binding or not depends on the cause, type, degree and frequency of non-compliance. Determining and addressing cases of non-compliance should be done according to procedures and mechanisms under Article 18. **(Republic of Korea)**

366. Procedures and mechanism resulting in binding consequences, that means the procedure, institutional arrangement and consequences, should be adopted by means of an amendment to the protocol, in accordance with Art.18. **(Poland)**

367. There must be strict compliance with the requirements of Article 18. Any decisions, however denominated, implementing Article 18 or any other provision of the Kyoto Protocol and entailing binding consequences for non-compliance by a Party must be adopted by means of an amendment to the Protocol. A broad, but reasonable, interpretation should be given to the phrase "entailing binding consequences", so that there is full compliance with this requirement of Article 18. For example, proposals by certain Parties that non-compliance with Articles 3, 5, or 7 of the Protocol should result in prohibiting participation in Articles 12 or 17 must be adopted, if at all, as amendments to the Protocol.

368. Any of the procedures and mechanisms referred to in our Responses could "entail binding consequences". Imposition of financial penalties clearly would be a "binding consequence". If the MCP recommended that an Annex I Party take certain actions to avoid or to cure its non-compliance with its assigned amount, failure to take such actions, followed by exceeding, or not curing non-compliance with, the Annex I Party's assigned amount necessarily would result in a financial penalty. Therefore, being subjected to such recommended actions would be a "binding consequence". Prohibiting participation in Articles 12 or 17 because of non-compliance with Articles 3, 5, 7, 12 or 17 of the Protocol (or any "rules", "guidelines", "principles", or "modalities" implementing any of those Articles, if otherwise permitted under the Protocol) would constitute a "binding consequence". In short, a "binding consequence" under Article 18 is anything that an Annex I Party must do or suffer, as a consequence of "non-compliance", to which it previously has not explicitly agreed in another provision actually contained in the Protocol. **(Saudi Arabia)**

369. At COP 4, in the context of developing the mandate for the non-compliance joint working group, it was recognized that it was not necessary to decide at that time under which article(s) of the protocol the compliance regime would be placed.

370. Specifically concerning binding consequences, it was noted that such consequences may be appropriate in parts of the Protocol beyond Article 18. For example, just as Article 6 provides the consequences in relation to JI of failure to abide by obligations under Articles 5 and 7, the emissions trading rules may set forth the consequences in relation to trading of failure to abide by obligations under Articles 5 and 7. Article 18 would not prohibit such an approach, given that, by its terms, it only applies to procedures/mechanisms "under this Article", i.e., under Article 18.

371. As we develop the regime, however, we will need to be mindful of the implications of Article 18 for any procedures/mechanisms under that Article entailing binding consequences. The amendment route raises concerns, for example:

(a) It would not be known upon ratification whether the Article 18 piece of the compliance package (that would be pre-negotiated by COP 6) would ultimately enter into force as an amendment.

(b) Even if the amendment were likely to enter into force, no Party would be bound to ratify it. Thus, even a compliance regime that were equitable and parallel in its treatment of various Parties would have no guarantee of actually receiving the ratification of all such Parties.

372. On the other hand, the other available options are also problematic:

(a) The option of avoiding any binding consequences and any procedures/mechanisms that could entail binding consequences (so as to avoid the requirement for an amendment) is not desirable from a substantive point of view.

(b) The option of inserting as much as possible of the compliance regime into the rules for the various Kyoto mechanisms is also not viable:

373. Whereas the regimes for the individual mechanisms might appropriately contain procedures/consequences for not complying with the rules for those mechanisms, they would not be the appropriate place to address the procedures/consequences for violating Article 3, in particular for those Parties that are not even using that mechanism.

374. Even if the rules under Articles 6, 12, and 17 did somehow contain procedures/binding consequences for violations of Article 3 by Parties using any one of those mechanisms, there would be an unacceptable gap as to the consequence for a Party whose emissions exceeded its target that had not used any Kyoto mechanism or that had used only Article 4. Such a lack of parallelism would be a fatal flaw in the compliance regime.

375. Further thought must be given to this apparent dilemma. **(USA)**

VII. OTHER MATTERS

Domestic systems

376. In order to ensure that the Protocol's compliance system works to prevent non-compliance and to facilitate and promote compliance, this system should promote strong domestic compliance. Parties' domestic implementation of their Protocol obligations is crucial to fulfilment of the objectives of the Protocol. There may be scope under the Protocol for developing a two-tier compliance framework, such that compliance measures are applied and enforced both at national and international level. The implementation of procedures at a national level for judging compliance in the first instance would give Parties the flexibility to develop their domestic procedures in accordance with their national system and circumstances, provided these procedures meet agreed international requirements. These domestic procedures should work in a complementary manner with international compliance procedures to ensure that consistency in outcomes is achieved. **(Australia)**

377. The compliance system so designed should encourage Parties with sufficient flexibility to build and develop domestic regimes in accordance with their national circumstances to effectuate their commitments under the Protocol, provided they satisfy agreed international obligations. **(China)**

378. The compliance system is likely to comprise a series of building blocks, covering rules at both the national and international levels. A basic distinction needs to be drawn between the requirements at each level. A fundamental building block will be domestic control measures and their effective implementation at the national level. At this level the precise means of implementation may be different in each case according to the approach to implementation adopted and the particular legal requirements of each national jurisdiction. Whilst the means of domestic implementation would be a matter for individual Parties to determine, the implementation mechanisms, legislative requirements and administrative procedures adopted in each case should be reported to the UNFCCC for transparency purposes and to foster confidence in the compliance process. **(New Zealand)**

379. Achieving compliance with the Protocol's obligations will largely depend upon domestic enforcement by various Parties of their laws implementing the Protocol. With appropriate procedures and consequences, the international non-compliance regime will create incentives for Parties to have strong and effective domestic enforcement. The international regime should not, however, be directly involved in domestic enforcement. This being so, Parties should be required to report on the domestic enforcement regime(s) applicable to domestic laws implementing Protocol obligations, particularly Article 3. **(USA)**

National circumstances

380. It is desirable that the system should be designed so as to adequately take into account each country s special circumstances during the commitment period, for example unexpected exogenous shocks or natural disaster. **(Republic of Korea)**

Capacity-building

381. A capacity building programme may be required to ensure that both national inventory and reporting systems, and the Article 8 expert review process are fully functional in advance of the first commitment period. **(New Zealand)**

Compliance indicators

382. It will likely be necessary to provide a benchmark against which holdings of assigned amount, including the outcomes of transactions made under the Kyoto Protocol, Articles 4, 6, 12 and 17, can be compared to emissions annually as well as at the end of the five year commitment period. The Kyoto Protocol already requires Parties to establish a national system for the estimation of anthropogenic emissions by sources and removals by sinks of all greenhouse gases covered by the Protocol and for estimates to be reported annually (Articles 5 and 7). For reporting to be fully effective, however, a firm date should be set by which annual reports should be submitted. This would also serve the objective of making compliance more transparent. Comparisons with holdings of assigned amount under the Kyoto Protocol would be simplified if estimates in annual reports were also expressed in terms of their CO2 equivalent. **(New Zealand)**

True-up period

383. There will be a time gap between the end of a commitment period and the availability of data/final emissions inventories. In this regard, there should be a short period after the end of a commitment period during which Parties with quantitative target obligations would have the opportunity to cure any overage, for example, through acquiring units of assigned amount.**(USA)**

Structure

384. When designing a compliance system, the following structure and subjects ought, in our opinion, to be considered:

(a) Objective

(b) Structure of the Committee

(i) Size of the Committee

(ii) Qualifications of members
(iii) Capacity in which members act
(iv) Composition of the Committee
(v) Length of membership
(vi) Possibility of re-election
(vii) Appointment of chairman
(viii) Frequency of meetings

(c) Functions/Procedure of the Committee

(i) Eligibility to raise questions regarding compliance
(ii) Fact finding procedure
(iii) Rights of Parties concerned to participate in the process
(iv) Interim measures
(v) Confidentiality
(vi) Outcome **(European Union et al)**

Evolution

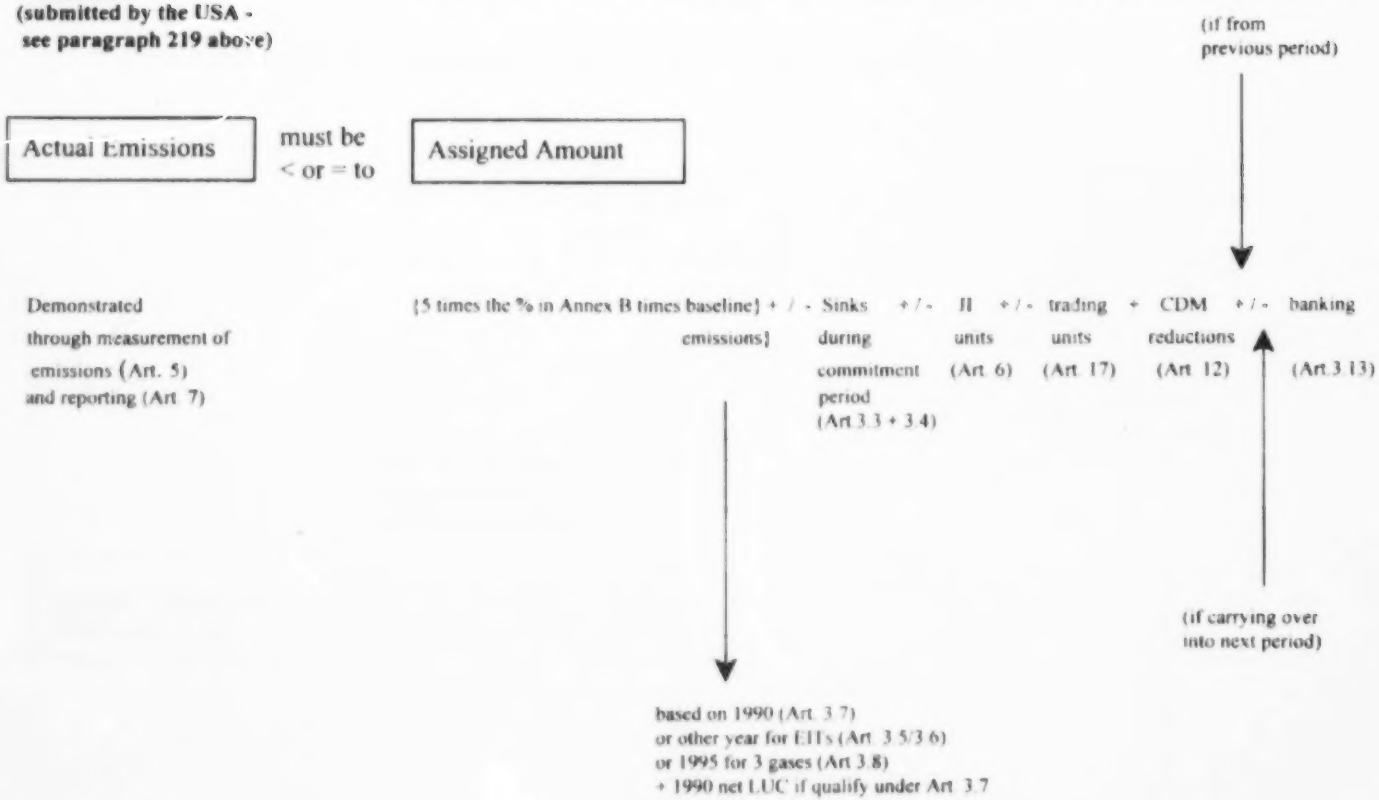
385. A system should be allowed to evolve over time to benefit from the initial stage of operation. **(Republic of Korea)**

Examination of existing multilateral agreements

386. In designing the compliance system, it is useful to examine the existing multilateral agreements, including multilateral environmental agreements (MEAs). **(Japan)**

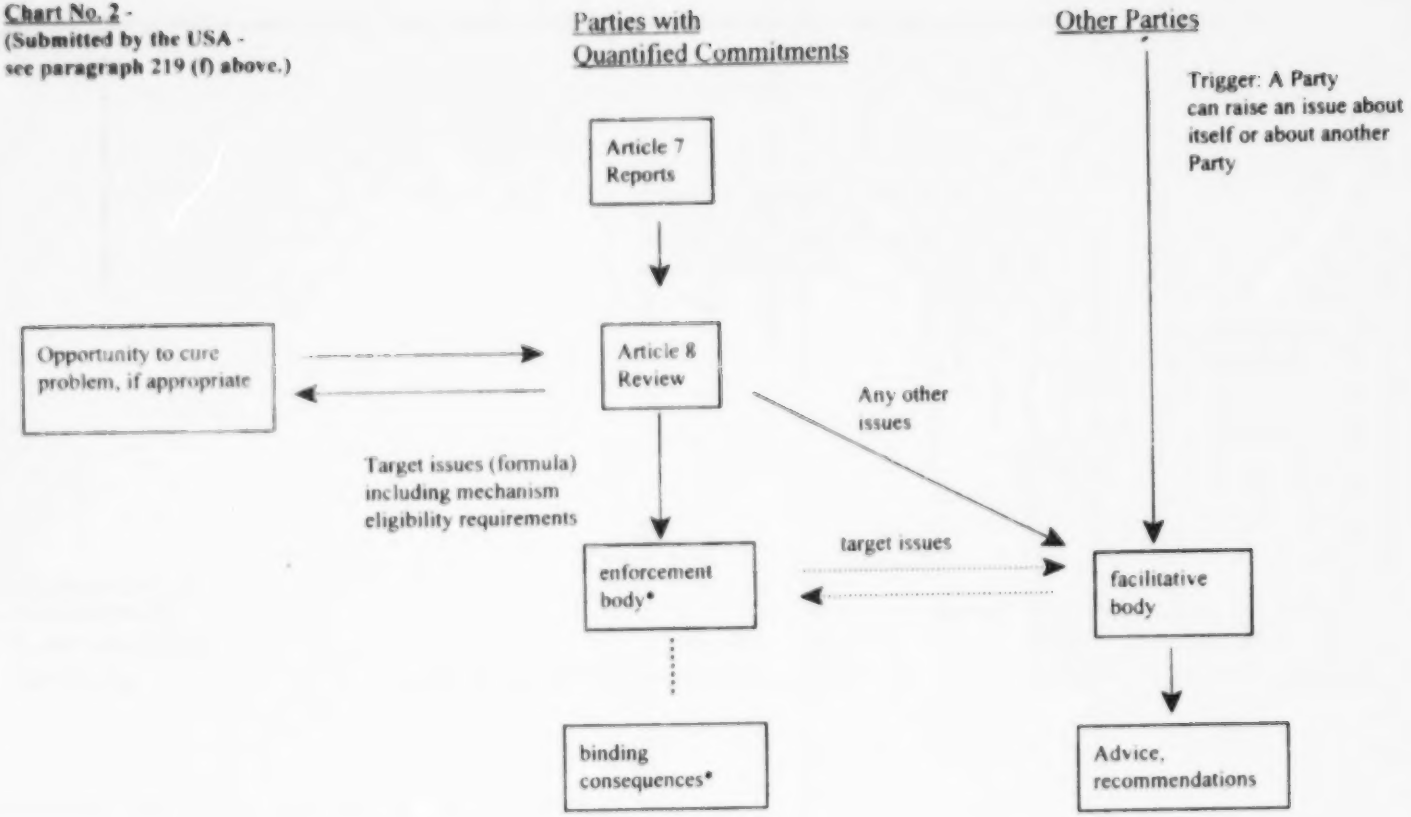
Chart No. 1
(submitted by the USA - see paragraph 219 above)

CALCULATING COMPLIANCE WITH ASSIGNED AMOUNTS (TARGETS)*


(if from previous period)
Actual Emissions
must be < or = to
Assigned Amount
Demonstrated through measurement of emissions (Art. 5) and reporting (Art. 7)
{5 times the % in Annex B times baseline} + / - Sinks + / - JI + / - trading + CDM + / - banking
emissions}
during commitment period (Art.3.3 + 3.4)
units (Art. 6)
units (Art. 17)
reductions (Art. 12)
(Art.3.13)
based on 1990 (Art. 3.7)
or other year for EITs (Art. 3.5/3.6)
or 1995 for 3 gases (Art 3.8)
+ 1990 net LUC if qualify under Art. 3.7
(if carrying over into next period)

* The formula would apply to Parties using an Article 4 bubble as a group, unless the group exceeded its aggregate assigned amount.

Chart No. 2 -
(Submitted by the USA -
see paragraph 219 (f) above.)



* Does this body have the final word on non-compliance and consequences? Is there a role for the COP/MOP?

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